SUBJECT INDEX

	Page
Opinion Below and Jurisdiction	1
Statutes Involved	1
Questions Presented	2
Statement	4
1. Identity of the Parties	4
2. Pet's Experience in the Frozen Fruit Pie Industry	5
3. Utah Pie's Experience in the Frozen Fruit Pie Industry	12
4. Utah Pie's "Grievance" Against Pet Milk Company	20
5. Price Competition Is "Local" or "Regional" in the Frozen Fruit Pie Industry	22
6. Pet Sells Pet-Ritz and Swiss Miss Pies at "List" Price, Less Off-Invoice or Promotional Allowance; BelAir Pies at Price f.o.b. Its Plant	25
Summary of Argument	27
A. Questions Presented by Petition	27
B. Questions Assigned by the Court	30
Argument	32
A. Questions Presented by Petition	32
1. Elements of a Violation of Section 2(a) of the Clayton Act, as Amended; Defenses	32
2. Standard To Be Applied in Determining the Sufficiency of the Evidence	34
3. Conclusions Reached by the Court of Appeals with Respect to the Evidence Against Pet Milk Company	36

Page

4. The Task Before the Supreme Court on Certiorari 37

5. "Utah Pie's Case Against Pet" 39

"a. Pet's Price Discriminations." 39

"(i) Overall Discriminations Shown by Annual Average Prices." 39

"(ii) Pet-Ritz/BelAir Discriminations." 39

(a) The Safeway Contract and Continuing Arrangement Were Not an Exclusive or "Total Requirements" Contract or Arrangement 41

(b) There Was No Territorial Price Discrimination in the Sale of BelAir Pies in Salt Lake at Prices Lower than Were Charged for Pet-Ritz Pies in Northern California 45

"(iii) Pet-Ritz/Pet-Ritz Discrminations." 49

"(iv) Swiss Miss/Swiss Miss Discriminations." 52

b. Evidence of Pet's "Predatory Tactics" 52

"(i) 'Investment Spending'." 53

"(ii) 'Industrial Espionage'." 58

"(iii) The Swiss Miss Fighting Brand" .. 63

6. Competition in the Intermountain Market Among Producers of Frozen Fruit Pies Was Not Lessened by Pet's Activities; and There Was No Reasonable Probability that Competition Might Be Injured 65

a. The Court of Appeals Found Absolutely No Injury to Competition 65

b. The Burden of Proving the Requisite Injury to Competition Was on Utah Pie Company, Plaintiff in the Trial Court 66

Page

c. The "Competition" Section 2(a) Is To Protect Is the Over-All Competition Among Sellers, Not the Competitive Position of One Seller Against Loss of Business to Another Seller 68

d. Criteria for Determining Competitive Vigor in a Market Have Been Established by Federal Trade Commission Cases 69

e. Importing Criteria from This Court's Opinions in Cases Brought Under Section 7, Clayton Act, Is Unwarranted 71

f. Utah Pie Presented No Direct Evidence in the Trial Court To Prove the Competitive Injury Required by Section 2(a) 72

g. What Is It on Which Utah Pie Relies in This Court as Proving the Requisite Competitive Injury? 73

(1) The Mere Existence of a "Large Conglomerate Enterprise" Is Said To Be a Threat to Competition (Brief 69) 74

(2) Discriminatory Pricing by Large Conglomerate Enterprises Is Said To Threaten Competition (Brief 71-73) .. 75

(3) The Court of Appeals, in Assessing Competitive Injury, Is Said To Have "Ignored the High and Apparently Growing Concentration in This Industry." (Brief 78) 76

(4) The Court of Appeals Is Criticized for Considering "Each Respondent's Price Discriminations as if They Had Occurred in a Vacuum." (Brief 80) 79

(5) Discriminatory Price Cuts by a Major Competitor Are Said To Injure a Competitor by "Depressing Market Prices as Well as by Diverting Business." (Brief 81) 80

Page

(6) Evidence of Intent To Destroy a Competitor Is Said To Support a Jury Finding of an Incipient Threat to Competition (Brief 95-106) 82

(7) The Court of Appeals Is Said To Have Ignored Both the Facts and the Applicable Law in Assessing the Extent of Respondents' Price Discriminations (Brief 83-94) 82

7. Utah Pie Showed No Loss or Threatened Loss to Its Business or Property by Reason of Any Activity of Pet; Its Claim for Damage Was Based on Fallacious Legal Grounds 84

8. The Real Issue in This Case Is the Ability of a National or Multi-Regional Seller To Adapt Its Prices and Products To Meet Local or Regional Competitive Conditions 91

9. Pet's Sales Activities in Utah Are Not Like the Activities Found in the "Predatory" Price Discrimination Cases 100

B. Questions Assigned by the Court 102

1. Does Rule 50(d) of the Federal Rules of Civil Procedure Provide the Court of Appeals with Any Authority To Direct the Entry of Judgment for Respondents? 103

a. Source of Appellate Court's Authority To Direct Entry of Judgment n.o.v. 103

b. Procedures Prior To Adoption of Federal Rules of Civil Procedure 104

c. Adoption of Federal Rules of Civil Procedure 108

d. Effect of Federal Rules, Particularly 50(d), on Authority of Appellate Courts 112

2. If the Court Affirms the Judgment and Order of the Court of Appeals Directing the District Court To Enter Judgment for Respondents,

Page

Can Petitioner Then Make a Motion for New Trial Under Rule 50(c)(2) of the Federal Rules of Civil Procedure Within 10 Days of the District Court's Entry of Judgment for Respondents? 117

a. Function of Rule 50(c) 117

b. Function of a New Trial 119

3. If, Under the Order of the Court of Appeals, Petitioner Cannot Make a Motion for New Trial Under Rule 50(c)(2) Within 10 Days of the District Court's Entry of Judgment Against Him, Is the Order of the Court of Appeals Directing the District Court To Enter Judgment for Respondents Compatible with Rule 50(b) as Interpreted by This Court in Its *Cone, Globe,* and *Weade* Opinions? 124

a. View Expressed in *Cone* and *Globe* Would Limit Appellate Court's Authority 124

b. Rule 50(b) and the *Cone* and *Globe* Opinions 125

c. Situation in *Weade* Differed from that in *Cone* and *Globe* 127

d. Utah Pie's Contention that Court of Appeals "Removed" Denver Evidence 128

e. Pet's Position in the Present Case 132

Conclusion 134

TABLE OF AUTHORITIES CITED

CASES:

Aetna Casualty & Surety Co. v. Yeatts, 122 F. 2d 350 (4th Cir. 1941) 120

Aetna Ins. Co. v. Kennedy, 301 U.S. 389 (1937); modifying 87 F. 2d 683 (3d Cir. 1937) 108

American Tobacco Co. v. United States, 147 F. 2d 93 (6th Cir. 1944) 63

Page

Anderson v. Hudspeth Pine, Inc., 299 F. 2d 874 (10th Cir. 1962) 35
Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F. 2d 1950 (10th Cir. 1959) 101
Automatic Canteen Co. v. F.T.C., 346 U.S. 61 (1953) .. 67
Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd* 2331 F. 2d 356 (9th Cir. 1955), *cert. den.* 350 U.S. 991 (1956) ..70, 100
Baltimore & C. Line v. Redman, 295 U.S. 654 (1935); modifying and affirming 70 F. 2d 635 (2d Cir. 1934) 104, 105, 106, 112, 113
Belknap v. United States, 150 U.S. 588 (1893) 121
Berry v. United States, 312 U.S. 450 (1941) 111
Bruce's Juices, Inc. v. Amer. Can Co., 330 U.S. 743 (1947) 33
Cambuston v. United States, 95 U.S. 285 (1877) 121
Champion Spark Plug Co., 50 F.T.C. 30 (1953) 70
Chicago Sugar Co. v. American Sugar Refining Co., 176 F. 2d 1 (7th Cir. 1949) 33
City of Orlando v. Murphy, 94 F. 2d 426 (1938) 122
Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947) 3, 31, 102, 119, 124, 125, 127, 132, 133
Conway v. O'Brien, 312 U.S. 492 (1941) 111
E. B. Muller & Co. v. F.T.C., 142 F. 2d 511 (6th Cir. 1944) 101
E. Edelmann & Co., 51 F.T.C. 978 (1955) 70
Elgin Corporation v. Atlas Building Products Co., 251 F. 2d 7 (10th Cir. 1958), *cert. den.* 357 U.S. 926 (1958) 66
Federal Comm'n v. Broadcasting Co., 309 U.S. 134 (1940) 122
F.T.C. v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), remanded for further proceedings 289 F. 2d 835 (2d Cir. 1961) 100
Flowers v. United States, 86 F. 2d 79 (8th Cir. 1936) .. 122
General Foods Corp., 50 F.T.C. 885 (1954) 67, 70
Gerber Products Co. v. Beech-Nut Life Savers, Inc., 160 F. Supp. 916 (S.D. N.Y. 1958) 70
Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948) 3, 31, 102, 124, 125, 127, 132, 133
Halliday v. United States, 315 U.S. 94 (1942) 111

Page

John Simmons Co. v. Grier Brothers Co., 258 U.S. 82 (1922) 122
Johnson v. New York, N. H. & H. R. Co., 344 U.S. 48 (1952) 109, 110, 112, 125
Jones v. Thompson, 128 F. 2d 888 (8th Cir. 1942) 120
Klein v. Lionel Corporation, 138 F. Supp. 560 (D. Del. 1956), *aff'd* 237 F. 2d 13 (3d Cir. 1956) 33
Lipson v. Socony-Vacuum Corp., 87 F. 2d 265 (1st Cir. 1937) 68
Maryland Baking Co. v. F.T.C., 243 F. 2d 716 (4th Cir. 1957) 101
Midland Terminal Ry. Co. v. Warinner, The, 294 Fed. 185 (8th Cir. 1923) 121
Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940) 109, 117, 126
Moore v. Mead's Fine Bread Co., 190 F. 2d 540 (10th Cir. 1951); 208 F. 2d 777 (10th Cir. 1953); *rev'd*, 348 U.S. 115 (1954) 100
New York, New Haven & Hartford Railroad Co. v. Henagen, 364 U.S. 441 (1960) 112, 125
Porto Rican Tobacco Co. v. American Tobacco Co., 30 F. 2d 234 (1929) 100
Procter & Gamble Company, The, 58 F.T.C. 1203 (1961) 75
Purex Corp., Ltd., 51 F.T.C. 100 (1954) 70
Sanderson v. United States, 210 U.S. 168 (1908) 121
Slocum v. New York L. Ins. Co., 228 U.S. 364 (1913) 104, 106
Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951) 69
Standard Oil Co. v. United States, 221 U.S. 1 (1911) ..63, 65
State v. Northup, 367 S.W. 2d 512 (Mo. 1963) 121
Tinkoff v. United States, 86 F. 2d 868 (7th Cir. 1937) .. 121
United States v. American Linseed Oil Co., 262 U.S. 371 (1923) 68
United States v. Borden Co., 111 F. Supp. 562 (N.D. Ill. 1953) 33
United States v. General Electric Co., 82 F. Supp. 753 (D. N.J. 1949) 63
United States v. General Motors, 384 U.S. 127 (1966).. 63
United States v. Hamburgh-American S. S. Line, 216 Fed. 971 (S.D.N.Y. 1914) 64, 65
United States v. Sherwood, 312 U.S. 584 (1941) 114

Page

United States v. Singer Mfg. Co., 374 U.S. 174 (1963) 37, 38
United States v. Von's Grocery Co., 384 U.S. 270 (1966) 71
Washington-Southern Nav. Co. v. Baltimore & P. S. B. Co., 263 U.S. 629 (1924) 113
Weade v. Dichmann, Wright & Pugh, 337 U.S. 801 (1949) 3, 31, 102, 125, 127, 130, 133
Webb v. Illinois Central R. Co., 352 U.S. 512 (1957) .. 35
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 35
Yale and Towne Manufacturing Co., The, 52 F.T.C. 1580 (1956) 67, 69

STATUTES:

Act of March 3, 1891; 26 Stat. 826 104
Act of June 19, 1934, c. 651; 48 Stat. 1064; 28 U.S.C. § 2072 ..... 107, 113
Act of June 25, 1948, c. 646; 62 Stat. 963; 28 U.S.C. § 2106 113

Clayton Act:

Section 2, 38 Stat. 730, § 2 (1914), as amended by Robinson-Patman Act, 49 Stat. 1526, § 1 (1936), 15 U.S.C. § 13 (1964) 1, 2, 32, 50, 52, 65, 68, 70, 73, 82, 91, 94, 98
Section 4, 38 Stat. 731, § 4 (1914), 15 U.S.C. § 15 (1964) 1, 34, 84
Section 16, 38 Stat. 737, § 13 (1914), 15 U.S.C. § 26 (1964) 84
Conformity Act, Act of June 1, 1872, c. CCLV, § 4; 17 Stat. 197 109
Judiciary Act of 1789 (Act of Sept. 24, 1789; c. 20, § 24; 1 Stat. 85) 103, 113
28 U.S.C. Section 2106 ..... 30, 103, 104

RULES:

Federal Rules of Civil Procedure: Page

Rule 50 (309 U.S. 63 (1938)) 1, 30, 31, 102, 103, 117, 118

Rule 50(b) 112, 124, 125, 132

Rule 50(c) (as amended January 21, 1963, effective July 1, 1963, 374 U.S. 885) 2, 102, 115, 117, 118

Rule 50(d) (as amended January 21, 1963, effective July 1, 1963, 374 U.S. 885) 3, 102, 103, 112, 114, 115, 116, 128, 132

Rule 51 125

Rule 59 125

Rule 82 113

MISCELLANEOUS:

Advisory Committee's 1963 Note to Subdivision (c), Moore's Federal Practice Rules Pamphlet (1966) 871 118

Advisory Committee's 1963 Note to Subdivision (d), Moore's Federal Practice Rules Pamphlet (1966) 875 ..... 115, 128

Attorney General's National Committee to Study the Antitrust Laws, Report of (1955) 68, 69, 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 18

UTAH PIE COMPANY, *Petitioner,*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE RESPONDENT PET MILK COMPANY

OPINION BELOW AND JURISDICTION

The Opinion Below and Jurisdiction are stated in Brief for the Petitioner.

STATUTES INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a); Section 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U.S.C. § 15; Federal Rules of Civil Procedure, Rule 50, 308 U.S. 725-726 (1938),

as amended January 21, 1963, effective July 1, 1963, 374 U.S. 885. The statutes and rule appear in Appendix A of Petitioner's Brief. Sections 3 and 7 of the Clayton Act, as amended, listed by Petitioner (Brief 6) are not statutes involved in this petition.

QUESTIONS PRESENTED

The sole question presented on this petition, aside from the questions assigned by the Court in granting certiorari, is whether or not the Court of Appeals erred in finding that the evidence presented in the trial court by the Utah Pie Company against Pet Milk Company "was wholly insufficient to support a finding that Pet, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Pet, by price differences or other acts, would do so in the future, or that Pet had taken or would take any appreciable amount of frozen pie business from Utah Pie," in violation of Section 2(a) of the Clayton Act as amended. (R. 1502)

The questions assigned by the Court are as follows:

1. Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for a new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?

2. Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment against him,

the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U.S. 801?

3. Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?

Petitioner in its statement of "Questions Presented" (Petitioner's Brief, hereinafter referred to as Brief, 2-7), lists seven "undisputed facts," and states that one question is whether "these facts alone [are] sufficient to sustain a jury's verdict . . ." (Brief 2-3) The difficulty is that Petitioner's "undisputed facts" are not "undisputed facts," and are either immaterial or present a distorted and erroneous characterization of only part of the evidence. Petitioner then proceeds to state additional "facts" and to ask whether these, alone or in addition to the "undisputed facts," are sufficient to sustain the jury's verdict. (Brief 3) Petitioner states additional questions on page 4 of its Brief, some of which are relevant to Pet, and some of which are not. While these questions will be dealt with as phrased by Petitioner, they really go to the question of the sufficiency of the evidence.

STATEMENT

The nature of the complaint and the proceedings in the District Court and the Court of Appeals are adequately stated in the Opinion of the Court of Appeals (R. 1452-1453), and in Petitioner's Brief, p. 7. This Brief, filed on behalf of Pet Milk Company, ap-

pellant in Case No. 7309 in the United States Court of Appeals for the Tenth Circuit, deals only with those parts of Petitioner's Brief that are directed against Pet.

1. Identity of the Parties

Utah Pie Company, Petitioner, is a corporation engaged in the manufacture and sale of frozen fruit pies, with its headquarters and a plant for the manufacture of such pies in Salt Lake City, Utah. (R. 17) Utah Pie is what is known as a "regional" or "local" producer of frozen fruit pies, in that it has a plant in but one location, and sells and distributes its products from this plant to wholesalers or to cooperative grocery chains in Utah and nearby states. (R. 524-526; Pl. Ex. 82; R. 527, 3616)

Defendant-appellant, Pet Milk Company, is a corporation engaged in the manufacture and sale of several food products, including frozen fruit pies. Pet's main office is in St. Louis, Missouri. (R. 17) Of Pet's products, only frozen fruit pies are the subject of the present action. Plants for the manufacture of frozen fruit pies are located in Frankfort, Michigan; Chambersburg, Pennsylvania; and Fresno, California. (R. 1009-1010) Pet is a "national" distributor of frozen fruit pies, in that it attempts to distribute its pies from three plants to all parts of the United States. (R. 1010) Utah Pie and Pet both sold frozen fruit pies in Utah and neighboring states during the period covered by the complaint.

Utah Pie Company produces a frozen fruit pie eight inches in diameter, which weighs 24 ounces—commonly referred to as an 8-inch, 24-ounce pie. (R.

554) When Utah Pie began to make frozen fruit pies in 1957 (R. 524), it distributed the pies only under its Utah brand name. Later, during the period covered by the complaint, Utah Pie began to produce frozen fruit pies under the name Frost 'N' Flame, a "private or controlled label," for Associated Foods, a grocery chain in the Salt Lake market. (R. 553-554) Utah Pie also produced its pies under a "Sonny Boy" label (R. 516-517, 769), and a "Mayfresh" label (R. 516, 729), and in 1960 and 1961 Utah Pie produced pumpkin and mince pies for Safeway Stores, Inc., under the Safeway-owned BelAir label. (D. Ex. A-35; R. 1065, 5827; 5831, 5832)

Pet Milk Company originally produced an 8-inch, 24-ounce pie only under its Pet-Ritz label. (R. 1010, 1012) In August, 1960, Pet added an "economy pie" to its line. This was an 8-inch, 20-ounce pie, sold under the Swiss Miss label. (R. 972) Pet also, during a part of the period covered by the complaint, produced 8-inch, 24-ounce pies for Safeway Stores, Inc., under the Safeway-owned BelAir label. (R. 1137, 1138-1139; Pl. Ex. 42; R. 1041, 2226)

2. Pet's Experience in the Frozen Fruit Pie Industry

"Utah Pie's Case Against Pet" (Brief 16-33) and its Argument, based on this "case" (Brief 101-106, 112-118) cannot be evaluated unless the Court has some understanding of the development of the so-called frozen fruit pie industry, including the competitive forces at work; of Pet's experience in the industry; and of Utah Pie's experience in the industry.

In 1955 as part of a program to diversify its lines of "convenience foods," the Pet Milk Company became interested in the frozen fruit pie industry, then a new

and growing field. (R. 1010, 1011) Pet entered the industry through the acquisition of the Crystal Canning Company, Beulah, Michigan, whose Pet-Ritz Division then manufactured the pies. (R. 1009-1010) Initially, the pies were made in four flavors, and distributed in a relatively small north-central territory—the "Detroit-Chicago-Milwaukee area." (R. 1011)

At the outset Pet was faced with two problems. One was to accelerate consumer acceptance of and demand for the product. The other was to expand its facilities so that the pies could be distributed nationally, as other Pet products are distributed. (R. 1012) In solving the second of these problems, the plant originally acquired in Beulah was moved to Frankfort, Michigan, where larger production facilities were available (R. 1009-1010), and plants were later acquired in Chambersburg, Pennsylvania, and in Fresno, California. (R. 1010)

Solving the first of the problems was a longer and more expensive process. To create consumer acceptance and demand, Pet stressed quality of product, added new flavors, and began an extensive advertising campaign. (R. 1012, 1023) This included local advertising efforts, such as payments to groceries for cooperative advertising in local newspapers, distribution of coupons that might be used in purchasing pies, and demonstrations in grocery stores to show how easily the pies might be prepared. (R. 1012) The total amounts spent on advertising frozen fruit pies in 1957, 1958, and 1959 were $868,300, $936,800, and $866,100. (D. Ex. A-33; R. 1016, 5826) The greatest expenditures for advertising during these years were for national advertising through a half-hour television program, which featured Red Skelton. (R. 1016)

Within a very short time after Pet had entered the frozen dessert pie industry in 1955, the nature of the market began to change. The market expanded (R. 873) and as frozen pies became more and more in demand, numerous local or regional companies, such as Utah Pie, came into the industry. (R. 1010-1011, 1053) With the freight advantage the local or regional companies had over the national companies, whose products usually had to be shipped into a region from a more distant plant, the former were able to sell at reduced prices. (R. 878, 1053) Emphasis in many regional markets shifted from quality to price, and competition among pie producers was in price. With this increased price competition, prices of the pies declined. (R. 724, 725-726, 968-969, 971)

During 1957 and 1958, while prices were declining and the market was expanding (R. 873, 1011), Pet's sales of frozen fruit pies were not keeping pace with the expanding market. A comparison of the increase in total sales of all brands of frozen fruit pies with the decrease in the Pet-Ritz sales in the Intermountain Market, both absolutely and as a percent of the total market, can be made from a market study of Drs. Anderson and Lamborn. (D. Ex. A-35; R. 1065, 5827)

Sales of all brands of frozen fruit pies in the Intermountain Market increased from 57,060.0 dozens in 1958 (*Id.*, at 5829) to 226,908.0 dozen in 1961 (*Id.*, at 5832), an increase of 398 per cent.

Sales of the Pet-Ritz pie, Pet's original brand, decreased from a high of 14,176.5 dozen in 1959 (*Id.*, at 5830) to 3,784.5 dozen in 1961 (*Id.*, at 5842), a decline of 73.3 per cent. During this period, the Pet-Ritz sales in the Intermountain Area as a per cent of the

total sales of all brands of frozen fruit pies declined from year to year and were as follows:

1958—16.4% (*Id.*, at 5829) 1960—4.5% (*Id.*, at 5831)
1959—12.7% (*Id.*, at 5830) 1961—1.7% (*Id.*, at 5832)

That the declining sales of the Pet-Ritz pie were due to price competition was made clear by a salesman for Pet who testified at the trial as follows:

> "The Pet-Ritz label deteriorated in sales. Our sales went down. * * * The deterioration was because of price pies in the market that were cutting the price. We couldn't continue to sell at our price." (R. 971)

Even before 1958 Pet's officers realized that the Pet-Ritz pie was not selling as it should and that something more than advertising effort must be done to check its deteriorating market position and to eliminate losses on its frozen pie operations. As a first step William N. Harsha was brought back from Canada, where he had been managing director of Pet's Canadian Corporation, to become general manager of the Pet-Ritz Frozen Foods Division. (R. 1008-1009) Mr. Harsha's duties were those of a trouble-shooter. He was assigned to different divisions of the company by the President, to study their operations and their "financial and production problems." (R. 1009) This was his assignment with the Pet-Ritz Frozen Foods Division. (R. 1017-1018) On taking charge of the Division Mr. Harsha reviewed its operations, and decided initially to curtail the advertising expenditures (R. 1018) —a curtailment that became most apparent in 1960 and 1961. (R. 902-903, 1019-1021; D. Ex. A-33; R. 1016, 5825) Other economies were made, such as eliminating duplication in overhead, and increasing processing efficiencies. (R. 1029) Production methods were

improved, warehousing costs reduced, and freight costs were cut by better scheduling of deliveries. (R. 902-903)

Also in 1958, Pet's officers decided to make an analysis of the frozen pie market, to determine what kind of pie the housewife preferred. (R. 1056-1057) It was known that there was an "economy market and a quality market" (R. 1024), but Pet did not want to reduce the quality of the Pet-Ritz pie to enable it to compete with the so-called "price pies." (*Ibid.*) Large sums had been invested in advertising the name Pet-Ritz and to equate it with a quality product. *(Ibid.)*

As part of this effort to analyze the market, the Market Research Corporation of America was engaged to make a study to help Pet decide whether or not to add a second, "economy," brand of frozen dessert pies. (R. 499-503, 1056-1057) This study indicated that there was a market for an economy pie. (Pl. Ex. 61; R. 504, 2275, 2276-2278) In August 1960 the Pet Milk Company introduced the Swiss Miss pie in Utah and elsewhere in the United States (R. 972, 1027-1028), to enable the company to compete with the lower-priced pies. (R. 972, 1028, 1056) The Swiss Miss is an 8-inch, 20-ounce pie (R. 972), though it was not sold as cheaply as other, heavier frozen fruit pies in the Intermountain Market.[1]

---

[1] At the time it was first sold in the Intermountain Market, in August 1960, the Swiss Miss apple pie was sold at a wholesale price of $1.64 per case of six pies (D. Ex. A-35; R. 1065, 5827; 5843). At the same time the heavier Frost 'N' Flame pie, produced by Utah Pie, was sold at a wholesale price of $1.50 per case of six pies. (*Id.* at 5841) Thereafter during the period covered by this action, the Swiss Miss pie ranged in price from $1.62 to $1.68 per case, while the Frost 'N' Flame pie ranged in price from $1.37 to $1.55 per case. (Compare *Id.* at 5841 with *Id.* at 5843.)

In addition to adding the lighter Swiss Miss pie to its line of frozen fruit pies in 1958 to improve its competitive position, Pet also entered into negotiations with Safeway Stores, Inc., for the production for Safeway of frozen pies under the BelAir label. (R. 1023, 1148-1151) Under this contract, Pet was obligated to manufacture a maximum of 2,000,000 BelAir frozen fruit pies for Safeway and Safeway was to purchase a minimum of 1,000,000 of the pies during the year 1960. (Pl. Ex. 42; R. 1041, 2226, 2228) A minimum quantity was set because Pet had to buy new equipment to handle the added production, and assurance of a minimum purchase for one year was needed to compensate for the cost of the equipment. (R. 1147-1148)

Simultaneously with these efforts to cut costs and improve volume of sales, Pet in 1958 began to reduce its advertising expenditures for frozen fruit pies. (R. 902, 1016, 1019) From $866,100 in the year 1959, expenditures for advertising were reduced to $337,500 in fiscal 1961, and to $42,600 in fiscal 1962. (D. Ex. A-33; R. 1016, 5826) (On April 1, 1960, Pet changed its fiscal year for accounting purposes from the calendar year to year ending each March 31. Consequently there is no fiscal year 1960. R. 901) By the time the present case was tried, Pet's Frozen Foods Division, the chief operation of which is production of frozen dessert pies, was making a net profit. (*Ibid.*)

Thus, in the six to seven years after Pet entered the frozen fruit pie industry,

> Pet had helped introduce a new product through intensive advertising and, in doing so, experienced rather severe losses on its sales of frozen fruit pies in all parts of the United States.

The market for the new product had expanded phenomenally. Total sales had almost quadrupled in the Intermountain Market, where Utah Pie sells most of its frozen pies.

Numerous new companies, including Utah Pie, had entered the industry, many of them local or regional producers, with a freight advantage over producers like Pet, who had to ship their pies from one market to another.

Entry of the numerous new producers changed the competitive nature of the industry from emphasis on quality to emphasis on price; and, as a result, prices declined.

Unable to meet the prices of competing pies, because of the costs of producing and distributing its Pet-Ritz pies, sales of Pet-Ritz pies declined.

To adopt itself to the changed market Pet introduced a new, economy pie, the Swiss Miss pie, and entered the "private label" field, through the manufacture of BelAir pies for Safeway.

Meanwhile, Pet drastically reduced advertising expenditures and effected other internal economies to bring its frozen fruit pie operation into a profit position.

(Since this appeal is concerned with allegations of discriminatory pricing by Pet, it should be emphasized that *never* during this introductory period and when sales of the Pet-Ritz pie were declining both absolutely and as a per cent of the market, *did Pet in the Intermountain Market reduce the price of this pie to the levels of pies of the same weight and quality produced by Utah Pie. Instead, the Pet-Ritz pie was always sold in this market at prices that were substantially higher than were the prices at which the brands of pies made by Utah Pie were sold, and the*

Swiss Miss pie has always sold at prices higher than the heavier Frost 'N' Flame pie made by Utah Pie. See D. Ex. A-38; R. 1100, 5827; 5835-5838, 5841, 5843).

3. Utah Pie's Experience in the Frozen Fruit Pie Industry

For some 30 years prior to August 1957 the Utah Pie Company, owned by the Rigby family, had made fresh-baked pies at a plant in Salt Lake City. (R. 522, 524) In August of 1957, two years after Pet had begun its effort to stimulate consumer interest in frozen pies, in Utah and elsewhere, Utah Pie entered the industry (R. 524) at a minimum of expense. Asked what additional equipment "or anything else" was needed for the "transformation from the baked pie business into the frozen pie business" (R. 524) Mr. Gaylen Rigby, Utah Pie's salesman and an important figure in the conduct of the company's affairs (R. 522), answered,

> "There was nothing. We needed nothing to move from fresh pie to frozen pies." (R. 524)

When Utah Pie came into the market with its frozen pies it was aware that it had competitive advantages in its immediate area over other producers who were selling there. The "Utah" name had "consumer recognition." (R. 807-808) Since the plant was located in Salt Lake City, deliveries in small quantities could be made to wholesalers (R. 808), and Utah Pie had a freight advantage over more distant producers. (R. 809) These advantages caused buyers for retail groceries and chains to "favor" Utah Pie. Mr. Degenhardt, a buyer for Grand American Markets (R. 709) made this point (R. 713); as did Mr. Henzke, Grocery Merchandizing Manager of frozen food products for Safeway in Salt Lake. (R. 692, 694)

When Utah Pie entered the frozen pie industry it decided to emphasize its freight advantage, by selling at prices lower than those being charged by other producers then in the market. Testifying on how the company determined the initial price for frozen apple pies, Mr. Gaylen Rigby, Utah Pie's sales manager, said:

> "Being that we had a plant located here in Salt Lake City, with all of our advantages that we had, that we are local, and freight, and so on, we knew that we could not enter the market unless we could come up with a price that would interest the wholesalers in putting in our product. We knew that we'd have to be *a few pennies under our competition* because of our locale.
>
> * * *
>
> "So we talked to a broker. He was going to represent us. He looked over the situation, and we come up with a figure that we would enter the market with, that was $4.65 a dozen, at the price we had offered to our customers—the wholesalers—the customers here in Salt Lake City." (R. 878. Emphasis supplied.)

Prices of Pet-Ritz pies in the Intermountain Market for August 1957, when Utah Pie began to produce frozen pies, are not in evidence. In January 1958, however, the first date for which comparative prices are available, the "few pennies under the market" as far as Pet was concerned were from 34¢ to 42¢ per case of six pies or from 68¢ to 84¢ per dozen lower than the Pet-Ritz pie, the only pie Pet was then selling in Utah. During January 1958, in the Intermountain Market,

> Utah brand frozen apple pies were sold at a price of $2.08 per case of six pies, or $4.16 per dozen (D. Ex. A-35; R. 1065, 5827; 5835); while

Pet-Ritz frozen apple pies were sold at a low of $2.42 per case of six pies, or $4.84 per dozen, and at a high of $2.50 per case of six, or $5.00 per dozen. (*Id.* at 5837)[2]

Utah Pie also during this period began the production of a private-label pie—the Frost 'N' Flame pie, a label owned by Utah Pie, but sold exclusively to a grocery cooperative, Associated Foods. (R. 553-554) This pie is a 24-ounce pie, as are the Utah brand and Pet-Ritz pies. (R. 554) *Here again Utah Pie's competitive emphasis was on price.* The Frost 'N' Flame pie, a pie that is identical to the Utah label pie, in weight, ingredients, and crust (*ibid.*), was sold during September 1959 at $1.86 per case of six, or $3.72 per dozen (D. Ex. A-35; R. 1065, 5827; 5841), at a time that the Pet-Ritz price ranged from $2.02 to $2.23 per case of six, or from $4.04 to $4.46 per dozen. (*Id.* at 5837) The Frost 'N' Flame pie appeared on the market permanently in January 1960, when it was sold by Utah Pie at $1.50 per case of six or $3.00 per dozen. (*Id.* at 5841) The Pet-Ritz price then ranged from $2.06 to $2.23 per case of six or from $4.12 to $4.46 per dozen. (*Id.* at 5838) The disparity between the prices of the Frost 'N' Flame brand pies and Pet's Pet-Ritz

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[2] This substantial difference between the prices Utah Pie charged for its Utah brand pies and the prices at which the Pet-Ritz were sold by Pet persisted throughout the period of time covered by this action, 1958 through September 8, 1961. During 1958, the Pet-Ritz frozen apple pies were sold at wholesale in the Intermountain Market at prices that were approximately $1.00 per dozen or 50¢ per case of six pies *higher* than the prices at which Utah brand pies were being sold by Utah Pie. (D. Ex. A-45; R. 987, 5846) During 1959, the difference ranged from 12¢ to 52¢ per dozen; during 1960, it ranged from 44¢ to $1.04 per dozen; and in 1961 from 48¢ to $1.89 per dozen—the Pet-Ritz price always being higher than the Utah brand price. (*Ibid.*)

pies continued throughout the ensuing months. (D. Ex. A-38; R. 1100, 5845)

On two other occasions Utah Pie stressed price competition in going into a new market or dealing with a new customer. In 1959, Utah Pie approached Mr. Doil Smith, then purchasing agent for Busley's Supermarket Company in Denver (R. 742) to offer pumpkin and mince pies under the Frost 'N' Flame label. (R. 743) Utah's price was described as "very good." (*Ibid.*) Asked what he meant by "very good," Mr. Smith answered,

> "The going price, as I remember, at that time was—the retail price was 47, 49 cents. The cost of these two varieties—this could be off a few cents either way—but as I remember, it was around $4.25 a dozen. And we procured these pies at something less than 33 cents." (*Ibid.*)

This, Mr. Smith said made the price at which he bought the pies "around $3.70" per dozen. *(Ibid)* "Denver hadn't heard of three for a dollar pumpkin and mince pies," Mr. Smith said later in his testimony. (R. 761) (The "three for a dollar" refers to a practice, which developed in the frozen fruit pie industry, under which retailers advertised and sold the pies at a price of $1.00 for three pies. See D. Ex. M-55; R. 717, 5528; and D. Ex. M-56; R. 717, 5539, where the pies are frequently shown as being advertised three for a dollar, 3/1.00 at retail. The exhibits were explained by Mr. Donald Edwin Anderson, who compiled them. R. 891-893.)

Price was again a competitive device when Utah Pie secured an order from Safeway Stores, Inc., for BelAir pumpkin and mince pies in the fall of 1960. A year later Utah Pie was negotiating with Safeway

for the production of the pies. "We are desirous of making your Mince and Pumpkin pies again this year," Mr. Gaylen Rigby wrote Mr. Alan W. Young, of Safeway, on August 23, 1961. (D. Ex. M-76; R. 843, 5574) After quoting the prices at which the pies would be sold to Safeway, Mr. Rigby's letter continued as follows:

> "The above prices on Mince and Pumpkin pies are a little higher than last season, but due to increase in our ingredient costs, shipping cases and the extra reports and other requisites, we find it necessary to make this increase." (*Ibid.*)

On August 25, 1961, Mr. Young responded as follows:

> "Thank you for your letter of August 23. We were somewhat surprised to find that your prices had increased 20¢ per dozen on Pumpkin and 17¢ per dozen on Mince as compared to last year.
>
> "You mention that this is due to the increase in ingredient costs, shipping cases and the extra reports and other requisites, and we are wondering to what extent we are being penalized for the reports we have requested.
>
> "It is our understanding that there has been no increase in the price of Pumpkin or Mincemeat as compared to a year ago . . ." (D. Ex. M-77; R. 843, 5576)

On August 28 Mr. Rigby wrote Mr. Young as follows:

> "In regards to our increased prices we realize they are above the 1960 price, but last year our price to you was at rock bottom as we were anxious to introduce our product to you and felt that giving this price we would have your business and perhaps work into something for the future." (D. Ex. M-78; R. 843, 5578)

With its many competitive advantages Utah Pie's success in the frozen fruit pie industry was nothing less than phenomenal. During the fiscal year that ended October 31, 1957, the company had a net loss of $6,461 on its entire operations. (D. Ex. A-46; R. 997, 5847; 5853; and D. Ex. A 47; R. 998, 5858; 5859) It was in August of that year that Utah first produced frozen fruit pies, in addition to its baked goods. (R. 524) The sale of frozen fruit pies during the remainder of fiscal 1957 could not have been great. Sales during subsequent fiscal years were as follows:

Fiscal Year	Volume, Cases of Six Pies
1958	68,604
1959	108,071
1960	177,534
1961	248,114

(Pl. Ex. 82; R. 527, 3616)

During its first four fiscal years in the frozen fruit pie industry, Utah Pie's sales had increased by 361.6 per cent, almost fourfold.

Similarly, its dollar volume of sales of frozen fruit pies, "Income, Frozen Pie Sales," had increased from $139,306.24 in the fiscal year ended October 31, 1958, to $407,841.25 in the year ended October 31, 1961 (D. Ex. A-46; R. 997, 5847; 5850)—an increase of 292.8 per cent. Expenses had, of course, increased with addditional volume and pie prices had gone down. Nevertheless, the company prospered financially.[3] Salaries paid the members of the Rigby family engaged in the business increased from $52,708 in fiscal

[3] Even when Utah's prices for pies were at their lowest, $2.75 per dozen for apple pies in June and July, 1961, Utah Pie made a profit. (R. 830-831)

1957 (*Id.*, at 5857) to $81,937 in fiscal 1961. (*Id.*, at 5855) Net income before taxes, as adjusted, had gone from a loss of $5,415.62 in fiscal 1957 and a net loss of $1,264.51 in fiscal 1958 to a gain of $30,597.10 in fiscal 1961. (*Id.*, at 5854)

Utah Pie's phenomenal increase in sales of frozen fruit pies—an increase of 362 per cent in four years—came in the face of sales efforts that were almost minimal. Utah had but one salesman, Mr. Gaylen Rigby, in the nine states in which it attempted to sell frozen fruit pies during the years 1958-1961. (R. 522, 813-814) The company maintained no permanent sales force in such cities as Spokane, Seattle, and Denver. (R. 778, 813) It once had a broker in Portland, but apparently only for a short time. (R. 778, 782)

Efforts to obtain the private label account of Miller's Supermarket in Denver did not go beyond one conversation with a local representative of the chain. During that conversation Utah's salesman was told he would "have to contact" the chain's "office in Chicago." (R. 780-781) This contact was never made. (R. 781) Utah's advertising as recently as 1961, other than cooperative advertising in newspapers and some instore demonstrations, was not sufficiently important even to be recalled by its salesman, Mr. Gaylen Rigby. (R. 887-888) Actually the amounts spent on all kinds of advertising during most of the years, as shown on a financial analysis of Utah Pie's books and records, were inconsequential—

In fiscal 1957	$ 432.21
1958	3,431.71
1959	3,180.29
1960	7,160.63
1961	1,226.01

(D. Ex. A-46; R. 997, 5847; 5850)

Utah Pie's reluctance to adjust its production procedures and facilities to meet the requirements of Safeway Stores, Inc., was an important, if not decisive, factor in contributing to its failure to manufacture more pies than it did under the BelAir Label for Safeway. (D. Ex. M-10; R. 479, 5435; D. Ex. M-11; R. 479, 5436; D. Ex. M-74; R. 843, 5569; D. Ex. M-79; R. 843, 5579; and D. Ex. M-84; R. 843, 5584) Mr. Alan Young, Manager of Safeway's Frozen Foods Division (R. 1136) testified on Utah Pie's lack of quality control procedures as a reason for Safeway's not contracting to have BelAir pies, other than the pumpkin and mince in 1960 and 1961, made by Utah. (R. 1139, 1160-1161)

To summarize Utah Pie's experience in the frozen fruit pie industry between August 1957 and September 8, 1961, the company

At a minimum of expense, entered an industry that was established and expanding.

Expended only moderate sums for advertising.

Utilized the efforts of only one salesman.

Began the production of three private or controlled label pies, for chain grocers.

Emphasized price competition by introducing its Utah brand and Frost 'N' Flame pies at prices that were substantially lower than the prices at which Pet's comparable pies were currently selling.

Increased its volume of sales by 362 per cent during its first four fiscal years in the industry.

Increased salaries and profits.

4. Utah Pie's "Grievance" Against Pet Milk Company

Having been so successful after its entry into the industry, while the Pet Milk Company was struggling to bring its frozen pie operation into some semblance of a profit position, what was Utah Pie's grievance and what was Pet's part in causing the grievance?

According to Utah Pie's salesman, Mr. Gaylen Rigby, the company had two basic complaints to make about its experience in the frozen fruit pie industry. The first was that it was forced three times to reduce its prices for the pies. The second was that the company had failed to get as much business as it thought it should.

The testimony on the price reductions, by Mr. Gaylen Rigby, was as follows:

> "In 1958 our price was $4.15 a dozen. We, through competitive action, we was forced to lower our price to, I believe, $4.00 the first time. And again we was forced to lower it to $3.70 a dozen. And then we—the last time we was forced to lower our price to any certain degree was in June of 1961, when we was forced to lower it to $2.75 a dozen. Then we raised the price back up, after I think about three or four weeks, we raised it back up to the old price. And then we were forced to lower it back down again to $2.90. And that's where our price has stood on apple pies until this date, $2.90 a dozen." (R. 551-552)

Later Mr. Rigby identified Carnation and Pet as having forced the 1958 reduction, but he could not recall their exact prices. (R. 792, 793) Inferentially, Pet is identified as having forced Utah Pie to reduce the price of its apple pies from $4.00 to $3.70 in 1959, but again Pet's exact price could not be recalled. (R. 793-794)

Pet's role in "forcing" Utah Pie to reduce its price is demonstrated by a study of D. Ex. A-35 (R. 1065, 5827, 5835, 5837); and D. Ex. A-38 (R. 1100, 5845). Utah Pie's reduction to a price of $4.00 a dozen ($2.00 per case of six pies for apple pies)[4] first appears in May 1958. (D. Ex. A-35; R. 1065, 5827; 5835) A comparison of Pet's prices for its Pet-Ritz pie with Utah's prices in the Intermountain Market is shown by the following tabulation:

Range of Prices, Intermountain Market
April, May 1958
(Cases of six pies)

	Apple Pies		Cherry Pies	
	Utah Brand	Pet-Ritz	Utah Brand	Pet-Ritz
April 1958	$2.02-2.08	$2.48-2.51	$2.07-2.08	$2.48-2.51
May 1958	$2.00-2.08	$2.50-2.52	$2.00-2.08	$2.50-2.58

(D. Ex. A-35; R. 1065, 5827; 5835 (Utah Brand prices); 5837 (Pet-Ritz prices))

It is inconceivable that Pet's prices could have "forced" any reduction in Utah Pie's prices in May 1958. Neither the Swiss Miss nor BelAir pie was being sold in the Intermountain Market at that time. (*Id.*, at 5843, 5844)

The situation in 1959 was similar. Utah Pie's reduction in the price of its apple pies from $4.00 to $3.70 per dozen ($1.85 per case) first appears in August 1959. (*Id.*, at 5835) The Pet-Ritz prices ranged from

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[4] To simplify price comparison in the trial of this action, prices for frozen apple pies were usually used. That pie is the most popular of the frozen pies (see Pl. Ex. A-35; R. 1065, 5827; 5829-5832), and it is lower in price than pies of other flavors. (*Id.*, at 5835-5844) Petitioner in its Brief to this Court emphasizes comparisons of prices for frozen cherry pies. The inclusion of cherry pies does not alter the general trends and picture.

$4.12 to $4.60 per dozen in July 1959, and from $4.04 to $4.46 per dozen in August 1959. (*Id.*, at 5837) The price of the lighter Swiss Miss apple pie ranged from $3.24 to $3.36 (*Id.*, at 5843); and the BelAir price was $3.66 f.o.b. the Fresno plant. (*Id.*, at 5844)

In June 1961, when Utah Pie was "forced" to a price of $2.75 per dozen, the Pet-Ritz price in the Intermountain Market was $4.64. (*Id.*, at 5838) The prices of the Swiss Miss and BelAir pies at that time were well above $2.75 per dozen, $1.38 per case of six pies. (*Id.*, at 5843, 5844) See page 25 *infra*, where price at which the BelAir pie is sold to Safeway is explained. The low price for apple pies in the Intermountain Market in July and August of 1959 was Utah Pie's Frost 'N' Flame brand—$3.00 per dozen or $1.50 per case of six pies.

As for the complaint that Utah Pie did not have as much business as it thought it should have, a complaint made by plaintiff's personnel in testifying on the alleged damages (R. 566-567), the discussion of Utah Pie's phenomenal success in the frozen fruit pie industry (pages 12-19 *supra*) speaks for itself. Pet's role in this connection would seem to be that of having, through its extensive advertising, created a market into which Utah Pie could easily enter and be successful.

5. Price Competition is "Local" or "Regional" in the Frozen Fruit Pie Industry

That competition among producers of frozen fruit pies is primarily price competition, and that this price competition is "local" or "regional" in nature is undisputed. The entry of numerous "local" or "regional" producers into the industry, and the shift from an emphasis on quality to an emphasis on price

was noted by Mr. Harsha, who was called upon to rescue the deteriorating Pet-Ritz operation for Pet Milk Company. (Pages 8-9, *supra*. R. 1008, 1010-1011, 1053) It is also typified by the entry of Utah Pie Company into the production of frozen fruit pies, at a price below that prevailing in the market. (Pages 13-16, *supra*. R. 524, 878)

"Salt Lake City, Spokane, Seattle, Portland, and Denver, and points in Nevada" are regarded as individual markets by the sales manager for Morton Frozen Foods (Continental Baking Co.) (R. 648, 651), as they are by the merchandising manager for a large chain operating in the Intermountain Market. (R. 711-712) Each market is different, Morton's sales manager said, and "many of these markets" support "local manufacturers." (R. 651) There is no relationship between prices in the different markets. (R. 651, 655) Mr. Gaylen Rigby, Utah Pie's sales manager (R. 522), confirmed this absence of relationship in prices. When asked whether he had ever changed "a price quotation in Salt Lake City because of a Seattle price change," and whether there is "any relationship . . . between the prices quoted in the two markets," his answer to both questions was "No." (R. 792)

Competition in the sale of frozen fruit pies is at the retail level—in the grocery store where the housewife buys the pies. This competition is expressed in retail advertisements of the pies, usually inserted in local newspapers on Thursday and Friday of each week. (R. 712, 749-750) The retail price is determined by the manufacturer's price. (R. 735, 791) Since a manufacturer's price must be low enough to permit a retailer to "quote a retail price which is equally as low as" its "retail competitor's" (R. 715, 791), the lowest

price in the market necessarily influences all manufacturers' prices. The manufacturer or producer who has the lowest costs is usually the producer with a plant in the region or locality. (R. 808-809, 878, 1053)

The Court of Appeals summarized its conclusions on these points as follows:

> "Because the competitive thrusts and pressures in a particular market area differ substantially from those at a given time in other market areas, the prices in each market area change from time to time independently of price changes in other market areas. Hence, the prices in the several market areas in such Intermountain and West Coast regions have little, if any, relation to each other and are not uniform. They vary from time to time and from market area to market area." R. 1458

* * *

> "The current retail price in a particular market area at a particular time is generally fixed by the prices at which the chain stores and cooperative grocery organizations advertise their frozen pies in the Thursday and Friday editions of the local newspapers, published and circulated in that market area." R. 1455-1456

* * *

> "The price in a particular market area depends on the number and identity of the competing manufacturers, the competitive thrust or pressure of such factors at a particular time. A local manufacturer and seller, with his plant located in a particular market area, because of his low distribution and selling costs, preferences normally given to a local business, and his ability to sell and distribute frozen pies in either large or small quantities, is in a position to assert a very substantial competitive thrust and pressure, not present where there is no local manufacturer and seller competing in the area." R. 1457

The Court of Appeals' conclusions with respect to Utah Pie's pricing activities in its Intermountain Market were expressed as follows:

> "Throughout the period here involved, Utah Pie's competitive emphasis was on price and except for a comparatively few instances, hereinafter noted, it sold its frozen pies at prices below those of its competitors." R. 1458

Later, Utah Pie was described by the Court of Appeals as the "first and arch price cutter" in the Salt Lake City market. (R. 1499. See also R. 1490.)

6. Pet Sells Pet-Ritz and Swiss Miss Pies at "List" Price, Less Off-Invoice or Promotional Allowance; BelAir Pies at Price f.o.b. Its Plant

In selling its Pet-Ritz and Swiss Miss pies to wholesalers, Pet publishes base or list delivered prices. (Pl. Ex. 76; R. 474, 2530) The price at which the BelAir pies are sold by Pet to Safeway is an f.o.b. price at its plants in Fresno, California; Chambersburg, Pennsylvania; and Frankfort, Kentucky. (Pl. Ex. 42; R. 1041, 2226; 2228; Pl. Ex. 43; R. 406, 2243) These base or list prices as published for Pet-Ritz and Swiss Miss pies are not competent evidence of prices actually paid by purchasers for purposes of Section 2(a) of the Clayton Act, or for any other purpose. This is because sales of these pies are seldom made at list prices and because two types of allowances are used in the industry to meet the lower prices often offered by competing frozen pie manufacturers. These are off-invoice allowances and cooperative advertising allowances. (R. 1030-1031)

An off-invoice allowance is in reality a temporary price reduction (R. 696, 710, 803) A wholesaler buying

directly from the Pet Milk Company pays the base or list price, an ex-warehouse or ex-truck price, less the allowance being given at the time a purchase is made. Both the list price and the amount of the allowance appear on the face of an invoice for the sale of the pies by Pet, and *the actual price the customer pays* is determined by subtracting the off-invoice allowance from the base price. (R. 1030) These are the prices that should be compared for purposes of Section 2(a).

A cooperative advertising allowance is an allowance made available to retailers, and differs from the off-invoice allowance which goes to wholesalers. The availability of a cooperative advertising allowance to the retailers is announced by Pet through its wholesale customers. The retailer who is interested in taking advantage of the offer must advertise Pet-Ritz or Swiss Miss pies in a local newspaper, and send tear sheets as proof of the advertisements to Pet. The allowance, so many cents per case of Pet-Ritz or Swiss Miss frozen pies purchased by the retailer during the period of the offer, is then paid after proof of the advertising has been submitted. Payment of the allowance does not affect the price the wholesaler pays Pet, and does not appear on the face of the invoice. (R. 1030-1031) There are no off-invoice or advertising allowances in the sale of BelAir pies by Pet to Safeway.

SUMMARY OF ARGUMENT

A. QUESTIONS PRESENTED BY PETITION

The Pet Milk Company has not violated Section 2(a) of the Clayton Act. The differences in Pet's prices between Salt Lake and California have been minimal. These differences did not substantially lessen competition or injure competition.

There is no basic dispute on the evidence in this case. The basic disagreement between Utah Pie and Pet Milk Company is in Petitioner's characterization of the evidence, and the inferences Utah Pie insists must be drawn from the evidence. Through repetition, through magnifying isolated incidents, and through resort to antitrust cliches, Utah Pie hopes to create the fabric of a four-year unremitting price war waged by Pet against Utah Pie. The evidence does not support this conclusion.

The "undisputed facts," alleged by the Petitioner, are either contrary to the evidence or distorted characterizations of the evidence. The repeated claim that Pet "planned losses" in order to wage a "price war" against Utah Pie is a grossly misleading characterization of Pet's use of funds to develop and advertise a new product, and its use of annual budgets to guide its operations from year to year. An isolated ill-advised visit to the Utah Pie Company is not of sufficient stature to be categorized as "industrial espionage." And finally, the making of a market analysis to determine the wisdom of manufacturing and promoting an economy pie cannot be characterized as "a predatory tactic."

Stripped of repetition and the erroneous characterizations, Utah Pie's evidence reveals no violation of

Section 2(a) by Pet. Assuming that Pet sold frozen fruit pies at prices lower in the Intermountain or Utah Market than elsewhere, as it did on a few occasions, there is no proof of the actual or potential injury to competition, in the Intermountain Market, required for a violation of Section 2(a). Utah Pie introduced no evidence in the trial court to prove the requisite injury. Petitioner would now have the Court find evidence of such injury, sufficient to take the case to the jury, from the discriminatory prices themselves, or from business operations that are either desirable in a dynamic economy, or necessary if a company is to operate efficiently and adapt itself to changes in market conditions.

Pet spent substantial sums introducing and promoting a new product. It suffered substantial losses as a result of this effort. The market for the product changed. Instead of a few producers with national or multi-regional distribution, the market came to be dominated by many regional producers, such as Utah Pie. Competitive emphasis shifted from quality to price. Prices declined. Pet continually analyzed the market and its internal operations so that it could adapt its operations to the changes and reduce its losses.

If these activities can be clothed in antitrust cliches to permit an inference of injury to competition, competition is dead.

While Pet was struggling with its problems in the frozen fruit pie business, Utah Pie began the production of the product Pet had been actively promoting. As a regional producer in the Intermountain Market, Utah Pie was in a position to sell at prices lower than the prices charged by producers, like Pet, who had

to ship their pies to that market. Utah Pie took advantage of this position, and became the leader in reducing the prices. Utah Pie's sales increased phenomenally and, though prices declined, the company's profits increased.

If Utah Pie's success in the market can be the basis for inferring damage or potential damage to its business or property by reason of Pet's activities, the concept of damage must be radically changed.

Finally, there was nothing in the evidence except the unsupported assertions of Utah Pie's sales manager to link any "damage" with Pet's activities. Throughout the entire period covered by Utah Pie's complaint, 1958-1961, Pet's prices in the Intermountain Market, where it competed with Utah Pie, were always higher than Utah Pie's prices for comparable pies. Insofar as Pet's prices were concerned, Utah Pie could have charged substantially higher prices for its pies, and thus enhanced its profits.

Utah Pie's real complaint in this case is that producers who do not have plants for making pies in the Intermountain Market are attempting to sell pies in that market. There is something sinister, Utah Pie believes, in a producer's sending its product to distant markets and not charging higher prices there than it charges at the plant, regardless of competitive conditions in either market. This belief raises the question of a seller's right to go into different markets, and sell at different prices, to meet differing competitive conditions.

If the "evidence" presented in Petitioner's Brief was sufficient to take the case to the jury and to support the jury's verdict, the effect will be to deprive a national or multi-regional seller from entering differ-

ent regional markets and attempting to meet the differing competitive conditions. This is neither the purpose Section 2(a) of the Clayton Act is to serve, nor the construction this Court should place on the section.

B. QUESTIONS ASSIGNED BY THE COURT

In granting certiorari, this Court asked that three procedural questions be brief and argued. The answers to the questions are as follows:

1. Rule 50(d) of the Federal Rules of Civil Procedure has no bearing on the authority of an appellate court to direct a trial court to enter judgment, notwithstanding the verdict of a jury, on the grounds of insufficiency of the evidence. This authority of the appellate court stems from Section 2106 of the Judicial Code of the United States. 28 U.S.C. § 2106.

2. No part of subsection (c)(2) of Rule 50 comes into play unless the trial court has granted the verdict-loser's motion for judgment n.o.v. When such a motion is granted, subsection (c)(2) allows the verdict-winner ten days after entry of judgment n.o.v. in which to make a motion for new trial, pursuant to Rule 59. An appeal transfers the jurisdiction of the cause to the appellate court. The trial court thereafter cannot entertain a motion for new trial without the permission of the appellate court and is bound to respect that court's mandate.

In the present case, the trial court denied both of Pet Milk Company's motions for judgment n.o.v. and for a new trial. The denial of the motion for judgment n.o.v. meant that Rule 50(c)(2) had no application.

3. The order of the court of appeals directing the entry of judgment by the trial court for the Pet Milk Company is compatible with Rule 50(b) as interpreted by this Court in *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212 (1947); *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948); and *Weade* v. *Dichmann Co.*, 337 U.S. 801 (1949).

Cone and *Globe* illustrate the consequences of the failure of the verdict-loser to comply with the requirements of Rule 50(b). The rule places procedural limitations on the power of an appellate court to exercise its jurisdiction under Section 2106. 28 U.S.C. § 2106. The failure to file the required motions deprives the trial court of an opportunity "to view the proceedings in a perspective peculiarly available to him alone" and "a last chance to correct his own errors without the delay, expense or other hardships of an appeal." 330 U.S. at 216. Here, the Pet Milk Company filed all motions required by Rule 50(b), which were denied. Hence, *Cone* and *Globe* are not applicable.

The court of appeals removed no evidence of Utah Pie insofar as the Pet Milk Company is concerned. Utah Pie admits that no evidence against Pet was erroneously excluded in the trial court and makes no suggestion that any additional evidence is available to it. Further, in this Court Utah Pie has advanced no alternative theory of liability against Pet. The *Weade* doctrine therefore does not call for a modification of the court of appeals' order to the trial court. To grant the Utah Pie Company a new trial or the right to so move in the trial court three and one-half years after the trial would serve no useful purpose under the circumstances of this case.

ARGUMENT

A. QUESTIONS PRESENTED BY PETITION

1. Elements of a Violation of Section 2(a) of the Clayton Act, as Amended; Defenses

The elements of a violation of Section 2(a) of the Clayton Act (38 Stat. 730, 1914), as amended (49 Stat. 1526, 1936; 15 U.S.C. § 13(a), 1964)), are well known to this Court. The section prohibits sales at discriminatory prices to different purchasers of commodities of like grade and quality, where the effect of the discriminatory prices may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with the person who either grants or knowingly receives the benefit of the discrimination, or with the customers of either of them.

Sales at discriminatory prices do not violate the statute if the lower prices are cost justified, that is if the prices "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are" sold; or if the price changes are "in response to changing conditions affecting the market for" the products. A seller may rebut a prima-facie showing that he has violated Section 2(a) by proving "that his lower price . . . was made in good faith to meet an equally low price of a competitor . . ." (49 Stat. 1526, 15 U.S.C. § 13(b))

Section 2(a) is concerned *not* with offering prices, but with prices at which actual, contemporaneous sales of goods of like grade have been made. The words of the statutes make this clear—"it shall be unlawful for any person . . . to discriminate in price *between*

different purchasers . . . ." 15 U.S.C. § 13(a) (Emphasis supplied.) Between purchasers means that two or more actual sales have been made. *United States* v. *Borden Co.*, 111 F. Supp. 562, 580 (N.D. Ill. 1953). "There must be proof that a seller has charged one purchaser a higher price for like goods than he charged" another. *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 7 (7th Cir. 1949). "Moreover, no single sale can violate the Robinson-Patman Act [Clayton Act, Section 2(a), as amended by the Robinson-Patman Act]. At least two transactions must take place in order to constitute a discrimination." *Bruce's Juices, Inc.* v. *Amer. Can Co.*, 330 U.S. 743, 755 (1947). See also *Klein* v. *Lionel Corporation*, 138 F. Supp. 560, 563 (D. Del. 1956), *aff'd* 237 F. 2d 13, 15 (3d Cir. 1956).

Pet Milk Company has been charged with territorial price discriminations in the sale of frozen fruit pies,

> Pet is alleged to have sold its Pet-Ritz brand pies at prices lower in the Salt Lake, Utah, or Intermountain Market (the three are synonymous) than the prices at which these pies were sold in Northern California.
>
> Pet is alleged to have sold its Swiss Miss brand pies at prices lower in the Salt Lake market than the prices at which these pies were sold in Northern California.
>
> Pet is alleged to have sold BelAir brand pies (a private brand label owned by Safeway Stores, Inc.) to Safeway in the Salt Lake market at prices lower than the prices charged for its Pet-Ritz pies in Northern California. The BelAir, a private-label pie, and the Pet-Ritz, a proprietary-label pie, are said to be of like grade and quality.

If Pet is to be found to have violated Section 2(a) of the Clayton Act, as amended, the evidence must be sufficient to show that Pet

> sold pies of like grade and quality in Utah at prices below those charged for the pies in Northern California;
>
> that the sales in Utah substantially lessened or might lessen competition between Pet and other producers in the sale of the pies in the Intermountain Market, or tended or might tend to create a monopoly for Pet in the sale of the pies in that market, and
>
> that the sales of the pies in the Intermountain Market at the discriminatory prices were *not* cost justified, were *not* made in response to changing market conditions, or were *not* made in good faith to meet the equally low price of a competitor.

In addition the evidence must be sufficient to demonstrate that Utah Pie was "injured in [its] business or property by reason of" Pet's violation of Section 2(a). (Section 4 of the Clayton Act, 38 Stat. 731; 15 U.S.C. § 15)

2. Standard to be Applied in Determining the Sufficiency of the Evidence

The rule to guide an appellate court in determining whether or not a trial court erred in refusing to direct a verdict or to enter judgment notwithstanding a jury's verdict, for insufficiency of the evidence, is a stringent one. The rule has been stated as follows:

> "In considering a motion for a directed verdict the evidence, with all legitimate, reasonable, or proper inferences that may be drawn therefrom is to be viewed and construed in the light most favorable to the party against whom the motion is directed. In passing on the motion, the court may

not pass on the weight of the evidence, or determine where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.

"And, if the evidence and inferences therefrom, viewed in the manner stated above, are of such a character that reasonable men in the exercise of fair and impartial judgments may reach different conclusions, the motion should be denied and the issues submitted to the jury." *Anderson* v. *Hudspeth Pine, Inc.*, 299 F. 2d 874, 876-877 (10th Cir. 1962).

See also *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949); and *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, 513-514 (1957).

In the present case, the Court of Appeals for the Tenth Circuit adhered to this rule, when it said:

"A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclusions, the motion should be denied. In reaching its determination 'the court may not pass on the weight of the evidence or' decide 'where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the

credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.' *In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence.*" R. 1493-1494. (Footnotes omitted. Emphasis supplied.)

3. Conclusions Reached by the Court of Appeals With Respect to the Evidence Against Pet Milk Company

The Court of Appeals, after a prolonged study of the testimony and documentary evidence,[5] found the evidence "free from substantial dispute, except for a few statements of opinion or conclusions not based on any substantial underlying proof." (R. 1454). The court concluded "that the evidence was insufficient to support the verdict in favor of Utah Pie, or warrant the injunction." (R. 1453)

Commenting specifically on Pet, the Court said:

> "We conclude that the evidence was wholly insufficient to support a finding that Pet, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Pet, by price differences or other acts, would do so in the future, or that Pet had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie. We conclude the judgment against Pet should be reversed." R. 1502-1503. (Footnote omitted.)

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[5] The case was argued in the Court of Appeals on July 11, 1964, and the Court's opinion, by Judge Phillips, was filed May 25, 1965. R. 1451.

4. The Task Before the Supreme Court on Certiorari

Utah Pie in its Brief purports to bring to this Court's attention evidence and "undisputed facts" that are said to be sufficient to support the jury's verdict. The Court of Appeals in its opinion commented on the nature of the evidence as follows:

> "The § 2(a) claims and the conspiracy claim were tried at the same time and the evidence in support of them was commingled. Certain facts, if set out and considered in isolation, would present a distorted picture of these cases. To get a true perspective of them, the whole factual picture and the relation of each of the facts to each other must be brought into proper focus and considered together." R. 1453

Since Pet agrees with the Court of Appeals, and since Utah Pie in its Brief has not dealt fairly or in a consistent manner with the "facts" or evidence, Pet must analyze each of Utah's claims in the light of the evidence introduced in the trial court. This Court must determine who is correct.

In *United States* v. *Singer Mfg. Co.*, 374 U.S. 174 (1963), Mr. Justice Clark said:

> "We have examined the record (1,723 pages) in detail, as is necessary in these direct appeals [1] . . .

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[1] "[1] Whatever may have been the wisdom of the Expediting Act in providing direct appeal in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. See, *e.g.*, Gesell, A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases, in 1961 N.Y. State Bar Assn. Antitrust L. Sym. 98 (CCH). Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." 374 U.S., at 175.

Mr. Justice Harlan, dissenting in the *Singer* case, commented favorably on the content of footnote 1 as follows:

> "In conclusion, it is gratifying to observe the Court's recognition of the fact that the requirement of direct review in cases like this has become an anachronism in light of the modern work load of this Court. *Ante* note 1; see also the separate opinion of this writer in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 357, 364-365. The final outcome of this case might indeed have been different had this Court had 'the valuable assistance of the Courts of Appeals' (*ante,* note 1)." 374 U.S., at 202.

Here the Court has had asssistance; and the Court of Appeals recognized the task both it and the jury had with respect to the evidence in this case. On this point, the Court of Appeals commented as follows:

> "Utah Pie's conspiracy claim and § 2(a) claims and Continental's counterclaims were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. *The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an impossible one. Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation.*" R. 1511. (Emphasis supplied.)

5. "Utah Pie's Case Against Pet"

On pages 16-33 of Petitioner's Brief, Utah Pie Company presents its "case against" Pet Milk Company. Much of what is said on these pages and elsewhere in the Brief is irrelevant to the issue before this Court, and much of what is said is inaccurate. To the extent possible Pet will confine itself in its Brief to the evidence relevant to the alleged violations of Section 2(a) of the Clayton Act, the evidence on discriminatory pricing and the defenses of 2(a) and 2(b); the evidence of competitive injury; and the evidence of any damages Utah Pie may have suffered by reason of Pet's allegedly illegal pricing.

"a. Pet's Price Discriminations."

"(i) Overall Discriminations Shown by Annual Average Prices."

Utah's discussion of "Pet's Price Discriminations" begins on page 18 of Petitioner's Brief. "On an overall average basis," the Brief says, Pet realized lower net prices in its Salt Lake Division in 1958 and 1959 than it did in the rest of its frozen pie business nationwide." On page 19, average annual prices for the years 1960 and 1961, are listed. By no stretch of imagination or law can "average annual prices" be said to be the actual price at which any sale was made at any place.

"(ii) Pet-Ritz/BelAir Discriminations."

Utah Pie's Brief asserts several claims against Pet Milk Company on the basis of the production by Pet of Bel-Air private-label pies for Safeway Stotes, Inc. What has been called in this case the "Safeway contract" and Pet's reasons for the going into the pro-

duction of a "private label" pie have been discussed. (Pages 9-10, *supra.*) The contract, entered into on January 1, 1960, obligated Safeway to purchase a minimum of 1,000,000 cases (six pies per case) of BelAir frozen fruit pies from Pet during the year. (Pl. Ex. 42; R. 1041, 2226; 2228, 2236) Pet was obligated to produce a maximum of 2,000,000 cases of BelAir pies during the year. (*Id.*, at 2228) The contract was renewable at the end of the year. (*Id.*, at 2226) The contract was renewed orally for one year, and thereafter to the time of trial the production of BelAir pies by Pet for Safeway was continued without a formal contract. (R. 1139, 1151) The arrangement was cancellable by Safeway "on a week's notice if we [Safeway] thought it was good business." (R. 1139)

Utah Pie's claims against Pet on the basis of the contract and the continued production of BelAir pies by Pet for Safeway appear to be as follows:

(a) The contract was an exclusive dealing or "requirements" contract, which prevented Utah Pie from producing BelAir pies for Safeway's Salt Lake and Denver Divisions. Brief 23, 32-33, 91.

(b) The sale of BelAir pies by Pet to Safeway's Salt Lake Division at prices lower than Pet charged for its Pet-Ritz pies in Northern California was an illegal price discrimination, which depressed the prices for frozen fruit pies in the Salt Lake market, and prevented Safeway's Salt Lake Division from purchasing Utah brand pies from Utah Pie. Brief 19-23, 63 90, 92.

The differences in prices for the BelAir and Pet-Ritz pies were not cost justified. Brief 21, 63, 116-118.

These claims are discussed below.

(a) The Safeway Contract and Continuing Arrangement Were Not an Exclusive or "Total Requirements" Contract or Arrangement

The 1960 contract between Pet and Safeway for the production and purchase of BelAir pies was not an exclusive or total requirements contract, either on its face or otherwise.

Safeway's Divisions were not required to handle BelAir pies, and they purchased other brands of pies, including Utah's Utah brand. (R. 544, 698, 707, 1138, 1146, 1473)

The contract obligated Safeway to buy a minimum of 1,000,000 cases of the pies from Pet during 1960. (Pl. Ex. 42; R. 1041, 2226; 2228) This minimum was set because Pet "had to buy some new equipment to take care of our [Safeway's] production and demand, and they [Pet] weren't willing to do that, and I [Alan Young, Manager, Safeway's Frozen Foods Division] don't blame them, without some assurance of a minimum quantity." (R. 1136, 1147-1148) The minimum was well below Safeway's estimated total requirements of BelAir pies for 1960, conservatively estimated by Mr. Young as "a million and a half" cases. (R. 1148) Mr. Young "could have bought the other half a million where I wanted." (*Ibid.*)

Safeway bought BelAir pies elsewhere when it contracted with Utah Pie for the production of BelAir pies in pumpkin and mince flavors during the Thanksgiving and Christmas seasons of 1960. (D. Ex. M-73; R. 843, 5568. D. Ex. M-76; R. 843, 5574. D. Ex. M-81; R. 843, 5581. D. Ex. A-35; R. 1065, 5827; 5831) Some BelAir pies of these flavors were bought by Safeway from Utah in 1961 (D. Ex. A-35; R. 1065, 5827; 5832), but negotiations for full production of these pies by

Utah Pie in 1961 came to an end when Utah Pie would not adapt its machinery to handle Safeway's new carton. (D. Ex. M-84; R. 843, 5584)

Utah Pie alleges that Pet's production of BelAir pies for Safeway prevented Safeway from contracting with Utah Pie for the production of BelAir pies in flavors other than pumpkin and mince. (Brief 23, 92) Safeway did not contract with Utah Pie for the production of other flavors of BelAir pies, but this was not because of Safeway's contract with Pet. Utah Pie consistently refused to establish quality control procedures Safeway would require of any producer of BelAir pies. (R. 492, 493, 1139, 1160-1161. D. Ex. M-74; R. 843, 5569. D. Ex. M-75; R. 843, 5571; 5572. D. Ex. M-76; R. 843, 5462)

Throughout the Brief, Utah Pie cites "evidence" that Utah Pie's plant and Utah's quality control procedures met Safeway's requirements, to "flatly contradict" Mr. Young's testimony "that he was not satisfied with Utah Pie's quality control (R. 1139) . . ." (Brief 92) Although the point is not relevant to the 2(a) claim, the inference the Brief would have the Court draw is so erroneous that it cannot be overlooked.

Petitioner's Brief would lead the Court to believe that Safeway's quality control inspector or inspectors testified in the trial court with respect to Utah Pie's plant. (Brief 11, 92, 115) This was not the case. The testimony referred to at each place in the Brief (R. 497 is cited) is a hearsay statement by Ross K. Rigby, an employee of Utah Pie. (R. 481) Mr. Rigby's statement is said to be based on comments by a "Safeway man who came to" Utah Pie's plant. (R. 496) Also asserted as proof that Utah Pie's quality control met Safeway's requirements is the assertion that Mr.

Young told Utah Pie's sales manager to buy fruit to produce BelAir pies. (Brief 92) This is a *non sequitur,* and Mr. Young denied he had ever told Mr. Rigby to buy fruit. (R. 1139)

The question of the inspection of Utah Pie's plant by a Safeway "quality control inspector" is immaterial to the legal issues before the Court, but Petitioner's Brief has brought the issue before the Court in a way that does not accurately reflect the record.

An employee of Safeway did at one time "visit" Utah Pie's plant. (R. 1157-1158) This employee did not testify at the trial of this case. Petitioner's Brief states that Mr. Alan Young (Manager of Safeway's Frozen Foods Division) testified that the inspector who visited Utah Pie's plant was " 'not qualified to say that' " the plant was the cleanest he had ever seen. (Citing R. 1157) The Brief, p. 115, goes on to quote Mr. Young as saying the inspector "had just been sent to the Utah Pie plant to be 'educated.' " (Citing R. 1158) The inference is that Mr. Young was using Utah Pie's plant to "educate" quality control inspectors.

The Court should turn to the Record at pages 1157 and 1158 to see what the testimony actually was. Mr. Young testified that the employee in question, Mr. Shelburg, was qualified to inspect plants producing canned fruits and vegetables. (R. 1157) He was not qualified to inspect plants producing frozen fruit pies. (*Ibid.*) He was in Salt Lake City, and asked to be permitted to visit Utah Pie's plant " 'and learn something about the pies.' " (R. 1158) Consent was given, and that is all there is to the story. Mr. Shelburg may or may not have told Mr. Ross Rigby that Utah's plant was the cleanest he had ever seen. He was and con-

tinued to be an inspector of plants producing canned fruits and vegetables, but he was not an inspector of plants producing frozen fruit pies. (*Ibid.*)

The evidence on whether or not Utah Pie's quality control procedures met Safeway's requirements need not be labored further. The only person qualified to speak on the subject was Safeway's Manager of its Frozen Foods Division, Mr. Alan Young. Mr. Young testified as follows:

> "Q. [Mr. Lamb] Why has the Safeway Company not contracted with the Utah Pie Company to give them fruit pie business in the Salt Lake City area?
>
> "A. Well, it's been mainly a matter of quality and quality control. I have put a great deal of time and effort and money into maintaining a quality reputation for the BelAir line, fruits, vegetables, juices, and pies. This is one of the reasons I was attracted to the Pet Milk Company in the first place and selected them as our first supplier. I've looked into several others, Utah Pie Company included, particularly because of the freight savings to the Salt Lake market. But the more I checked into it the more I was satisfied in my own mind the quality would not be equal to the quality we had, and certainly not on a uniform basis because they have practically no quality control procedure at all. (R. 1139)
>
> * * *
>
> "Q. [Mr. Alioto] Now, do you recall that—well, do you recall the paragraph in the letter stating that you were concerned about the absence of any quality control in the Rigby plant?
>
> "A. Yes, this has been one of my main problems.

"Q. Now, what is it you mean by quality control in that sense, Mr. Young?

"A. Well, when you're producing millions of pies or hundreds of thousands of pies, unless you have a routine quality control established, checking all the way through the various ingredients and processing, temperatures and so forth, you've no idea what you're going to get and you can't get a uniform quality pie. They never took the temperature. They didn't even have a thermometer to take the temperature at any point out of the freezer or the temperature of the dough. In a pie all these things are important. They had no refractometer, which is an instrument you use to test the solids in a finished product, to see if you put too much sugar in or too little. I don't believe they even had an oven to bake off the pies at that time. They were baking them off in the stores when they had a demonstrator. They had no quality control personnel as such. There was no real quality control being exercised. Now, without this I couldn't have any assurance that the pies we would get out of there would be what we'd seen before." (R. 1160-1161.)

(b) There Was No Territorial Price Discrimination in the Sale of BelAir Pies in Salt Lake at Prices Lower Than Were Charged for Pet-Ritz Pies in Northern California

Utah Pie relies upon two kinds of evidence to show a territorial price discrimination in Pet's sale of Bel-Air pies in Salt Lake City at prices that were lower than the prices charged for Pet-Ritz pies in Northern California. One kind of evidence is the discriminations that "appear on the face of Pet's Safeway contract." (Brief 19) The prices shown "on the face of the contract" (Pl. Ex. 42; R. 1041, 2226; 2240) are not prices at which either Pet-Ritz or BelAir pies were actually sold. They were, as the heading on the chart states,

proposed or list prices, as of January 1, 1960, in full truck loads.

If these prices are to be considered in any way, Chart 2 must also be considered. (*Id.*, at 2241) Chart 2 shows that the differences in the list prices for the Pet-Ritz pies in Northern California and for the BelAir pies in Salt Lake were actually less than the differences in the cost of producing the pies in the Fresno plant. (Pies for Northern California and Salt Lake would be produced in Pet's plant at Fresno, California. R. 393)

The following tabulation makes possible a comparison of the differences in price with the differences in cost.

	Amount by which price of Pet-Ritz pie, N. Cal., exceeded BelAir price, Salt Lake	Amount by which cost of producing Pet-Ritz pie exceeded cost of producing BelAir pie at Fresno plant
Apple	$ .67	$ .7668
Blueberry	.48	.8891
Cherry	.72	.7738
Peach	.54	.7612
Boysenberry	.66	.7564
Pumpkin	.61	.8240
Mince	.33	.8106

(Source: Pl. Ex. 42; R. 1041, 2226; 2240, 2241)

The other evidence of discriminatory pricing of the BelAir pies in Salt Lake, in comparsion with the prices for the Pet-Ritz pies sold in California, is given in Appendix B of Petitioner's Brief, p. xiii. The prices for the BelAir pies sold in Salt Lake are from D. Ex. A-35; R. 1065, 5827; 5844. While there is doubt that the prices in this exhibit are comparable to the invoice

prices for the California cities, because there is no indication in Petitioner's Appendix B as to when the sales in either territory were made, the tabulation overlooks the fact that the BelAir pies were sold by Pet to Safeway *f.o.b. Pet's Fresno plant* (Pl. Ex. 42; R. 1041, 2226; 2228), while the Pet-Ritz pies were sold to all customers with freight "prepaid to destination." (See for example Pl. Ex. 76; R. 474, 2530; 2532, where the price list states "All direct shipments are prepaid to point of destination, prices subject to change without notice.")

If the BelAir prices in Salt Lake City are to be compared with the Pet-Ritz prices in the California cities, the freight costs incurred by Safeway in shipping the BelAir pies from Fresno to Salt Lake City should be added to the f.o.b. price paid by Safeway to Pet for the pies.

The certified public accountant, Mr. Grant Caldwell, employed by Utah Pie's attorneys to analyze documents produced by the defendants in pre-trial discovery (R. 233-234), estimated Pet's freight cost in shipping frozen fruit pies from Fresno to Salt Lake City to be 48 cents per dozen. (Pl. Ex. 27; R. 251, 2181, 2182; R. 254) This would be 24 cents per case of six pies. When this freight cost is added to the f.o.b. price of the BelAir pies sold in Safeway's Salt Lake City Division, the cost of the apple pies to Safeway would range from $2.02 to $2.13 per dozen, instead of from $1.78 to $1.89 per dozen as shown in Petitioner's Schedule B. The differences in price not accounted for by the freight paid by Safeway were more than cost justified.

Utah Pie's Brief attempts at several places to discredit the determination by the Court of Appeals that

any differences between the prices at which Pet-Ritz pies and BelAir pies were cost justified, under the cost-justification proviso of Section 2(a) of the Clayton Act. (Brief 21-22, 63, 115-117) Pet submits that the evidence on cost justification—the requirement in the original contract between Pet and Safeway that price differences be cost justified;[6] the testimony of Mr. Wohlheuter, Controller of Pet's Frozen Foods Division (R. 380, 903-906); the schedule attached to Pl. Ex. 42 (R. 1041, 2226, 2241); the Cost Analysis of Pet-Ritz and Bel-Air, Fiscal Year 1961-62 (Pl. Ex. 43; R. 406, 2243); and the detailed analysis of the methods used in "charging costs to our various operations, particularly the allocation of overhead and administrative costs between trade sales and private label sales" (Schedule B, Pl. Ex. 43; R. 406, 2243; 2244-2245)—more than adequately support the Court of Appeals conclusion that there was insufficient evidence to uphold a determination by the jury that the differences in price were not cost justified.

Utah Pie's claims that the "discriminatory" Bel-Air prices prevented Safeway's Salt Lake Division

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[6] 12. Cost Savings Differential:

Seller represents and warrants that the differences between the price paid by the buyer to the seller for the product sold hereunder and the prices at which the seller sells substantially similar products to its other customers will not exceed the savings realized by the seller in its cost of manufacture, sale (excluding brokerage or brokerage expense) or delivery which result from the different methods or quantities in which such products are sold and delivered by seller to buyer, and by seller to such other customers. It is agreed between the parties that on or about July 1, 1960 seller will review its pricing and cost structures to determine whether the prices quoted to buyer herein should be revised upward to reflect possible changes in its cost of manufacture, sale or delivery which would affect such savings. Pl. Ex. 42; 1040, 2226; 2230.

from buying Utah brand pies and had a "depressing" effect on prices for frozen fruit pies generally in the Utah market also fall. Any "depressing" effect on the general level of prices for pies in the Utah market resulted from Utah Pie's prices for its Utah and Frost 'N' Flame brands;[7] and Safeway bought Utah brand pies from Utah Pie throughout the period covered by the complaint in this case, 1958-1961. (R. 1473. Pl. Ex. 4; R. 67, 1535-1655, *passim.*)

"(iii) Pet-Ritz/Pet-Ritz Discriminations."

Utah Pie's discussion of the prices at which the Pet-Ritz pies were sold in Utah, the alleged Pet-Ritz/Pet-Ritz discriminations (Brief 24-26), is unclear at best. The discussion relies upon Pl. Ex. 112 (R. 4713). It is very doubtful that this exhibit was received in evidence. (See R. 627, 664, 993, 996.) The tabulations that make up this exhibit are "offering" or "base" prices, with off-invoice allowances and advertising allowances available during specified periods. (Pl. Ex. 112; R. 4712; 4713; 4834) The tabulation does *not* give the prices at which any sale of pies anywhere is shown to have been made. The exhibit was used by Judge Phillips of the Tenth Circuit to show the lowest "absolute" price at which anyone could have purchased Pet-Ritz apple pies in nine western markets. (See Appendix II to the Court of Appeals' opinion, R. 1515.)

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[7] The price of the Utah brand ranged from $1.75 to $2.00, and was always lower than the price of either the BelAir (f.o.b. Fresno plus freight, Fresno to Salt Lake City) or Pet-Ritz brand sold in the Salt Lake market. (D. Ex. A-35; R. 1065, 5827; 5835-5836) The price of the Frost 'N' Flame brand ranged from $1.37 to $1.55 (*Id.*, at 5841) with the exception of $1.86 in September 1959 (*Ibid.*) when 21 dozen of this brand were sold by Utah Pie. (*Id.*, at 5830)

Judge Phillips' conclusion was that Exhibit 112 proved that Pet's "absolute low" offering prices were lower in Utah than in any other market during only four of the 44 months the exhibit covers. (R. 1468) The exhibit was not relied upon by Judge Phillips to show the prices at which actual sales of frozen fruit pies were made, either in Salt Lake City or elsewhere.

Petitioner's Brief, at page 111, states that Appendix II to the Court of Appeals' opinion "purports to show *offering* prices rather than selling prices." The Brief continues, "to be sure, all respondents relied upon their offering prices to show sales prices . . ." With respect to the Pet Milk Company, this statement is simply not true. No citation to the Record is made as authority for Petitioner's statement. Pet has never asserted that offering prices were the prices to be considered for purposes of Section 2(a) of the Clayton Act. Quite the contrary, Pet has always contended that the only relevant prices for purposes of Section 2(a) are the prices at which actual, fairly contemporaneous sales are made. (Pages 32-33, *supra.*)

The only competent evidence introduced by Utah Pie to prove price discriminations by Pet Milk Company in the sale of its Pet-Ritz brand frozen fruit pies in the Salt Lake or Intermountain Market are Pl. Ex. 116; R. 993, 4836; Pl. Ex. 117; R. 993, 4947; Pl. Ex. 118; R. 996, 5034; Pl. Ex. 119; R. 996, 5098; Pl. Ex. 120; R. 996, 5230; Pl. Ex. 121; R. 996, 5250; and Pl. Ex. 122; R. 996, 5318. These invoices are not correlated in any way to make a comparison of the prices for Pet-Ritz pies in the different markets easily available. On the basis of an analysis of the exhibits made by Pet for the Court of Appeals, Pet concluded that

the invoices upheld a conclusion that Pet had sold frozen apple pies at lower prices than those charged in California on 10 occasions.

This conclusion was substantiated by the Court of Appeals' analysis of Pet's Exhibit A-40. (R. 983) This exhibit was a machine tabulation of Pet's sales of frozen fruit pies in seven western cities, selected because they are the cities in which most of Pet's sales are made. (R. 982-983) The invoices tabulated were those showing the lowest price at which pies were sold each month in these cities during the years 1958-1961. (R. 983, 984) The tabulation shows the customer's name, the flavor of pie, the quantity of pies purchased, and other information, including the off-invoice allowances and the net price for each sale. (R. 983)

The Court of Appeals' analysis of this exhibit appears as Appendix IV, annexed to its opinion. (R. 1468, 1519-1520) The exhibit was certified to this Court and is available to the Court though it was not reprinted in the Record because of its great bulk. The Court of Appeals' conclusions with respect to the exhibit were that Pet-Ritz frozen apple pies were sold by Pet to wholesalers in Salt Lake City at prices lower than the price for the same pie in Los Angeles during only three months (December 1959, March 1961, and April 1961); and at prices lower than the price in San Francisco during seven months (December 1959, August 1960, September 1960, January 1961, February 1961, March 1961, and April 1961). (R. 1469)

Pet's total sales of Pet-Ritz frozen apple pies in Salt Lake City during these months were found to be only 315.0 dozen. (R. 1470)

"(iv) Swiss Miss/Swiss Miss Discriminations."

Petitioner's Brief, page 27, seems to concede that there was "no actual 'discrimination', as Utah Pie calculates it," in the sale by Pet of its Swiss Miss pies in the Salt Lake market, as compared with the Northern California market, although the difference in price was said to be "substantially less than the freight" from "Pet's plant in California to Salt Lake (R. 254, 663)." Petitioner asserts later, however, that it does not consider "freight absorption" in determining prices for purposes of Section 2(a). (Brief 88)

Some reliance is placed on Pl. Ex. 112 (R. 4712) to demonstrate that the offering price for the Swiss Miss pie was lower in Idaho, Wyoming, and Colorado. The reasons Pl. Ex. 112 is not competent evidence for purposes of Section 2(a) have been noted above. See pages 49-50, *supra*.

The simple truth is that the competent evidence introduced by Utah Pie with respect to the prices at which the Swiss Miss pies were actually sold in different markets *does not show* sales of the pies in the Salt Lake or Intermountain Market at prices lower than those at which the pies were sold in other markets, except for one month; and the pie was always sold in the Intermountain Market at prices higher than the heavier Frost 'N' Flame pie, produced by Utah Pie, after Frost 'N' Flame came on the market permanently. (See the Court of Appeals' tabulation of Swiss Miss prices. R. 1471.)

b. Evidence of Pet's "Predatory Tactics."

Utah Pie really had no evidence of "predatory intent" or "predatory tactics" directed by Pet toward

it. The evidence brought to the Court's attention in Petitioner's Brief, stripped of antitrust cliches, consists of (1) the normal and necessary practice of business firms in drawing up annual budgets to guide their operations, (2) a single memorandum prepared by Pet's salesman which mentioned Utah Pie as a vigorous competitor, (3) a stupid visit by a Pet employee to Utah Pie's plant, and (4) the introduction of an "economy pie" to meet the apparent consumer demand for inexpensive pies. Only the sales memorandum and the visit to the plant were unique to Utah Pie. The budgets, anticipating net losses on the sale of the Pet-Ritz pie during the years in which advertising expenditures were high, and the introduction of the Swiss Miss economy pie were a part of Pet's over-all operation.

Furthermore, *absent proof of discriminatory pricing,* which absence has been demonstrated above, neither *intent nor the two isolated "tactics" become relevant.* Because, however, of the inflammatory nature of Petitioner's discussion of the "planned losses," "industrial espionage," and the "fighting brand" and "bogus independent," Pet must bring the Court's attention to the evidence on these points.

"(1) 'Investment Spending'."

Much is made throughout Petitioner's Brief about Pet Milk Company's "investment spending," its "planned losses," and its "below-cost sales" of its frozen fruit pies. In its "Questions Presented," Utah Pie refers to "net losses on their sales of frozen fruit pies in the area in which they did compete with peti-

tioner" (Brief 3), and asks whether "evidence that a respondent planned in advance to take losses on frozen pie sales in the area in which it competed with petitioner [is] evidence of predatory intent." The Brief also refers elsewhere to the "investment spending," "planned losses," and "sales below cost" as evidence of predatory intent. (Brief 16, 27-28, 98, 102) Petitioner would have the Court believe that Pet's losses on the sale of its frozen fruit pies were sustained *only* in Utah or the Intermountain Market, and were "aimed" at Utah Pie. (Brief 27, 102)

The evidence that Pet's "planned losses" or "below cost sales" were "aimed" at Utah Pie is a single memorandum written on September 15, 1959, by a salesman to his superiors to describe conditions in the Salt Lake City Market. (Pl. Ex. 37; R. 385, 2210. Brief 28) The memorandum is not connected in any way with Pet's advertising efforts, budgets, or "investment spending." The person called upon by Pet to salvage the floundering Pet-Ritz operation, Mr. Harsha (R. 1008) testified that Pet's budgets were not intended "to put the Utah Pie Company out of business" (R. 1021) and that he had not heard of Utah Pie until this suit was brought. (*Ibid.*)

Any contention that Pet's "planned losses" were directed at Utah Pie Company is further refuted by the fact that losses on the Pet-Ritz pie were anticipated by way of Pet's budgets before Utah Pie began to produce frozen fruit pies in August 1957. (R. 524) The budget for the year (calendar year) 1957, drawn up in 1956, anticipated a loss of $479,787. (Pl. Ex. 7; R. 409, 1926)

By whatever name Pet's financial experience in the frozen fruit pie business during the years 1958-1961 be called the "losses" were much more painful to Pet than they were to Utah Pie. The "investment spending" undoubtedly helped Utah Pie by creating a market for frozen fruit pies (R. 1010-1011, 1053), into which Utah entered with a minimum of effort and expense. (R. 524)

Unfortunately, Pet cannot and does not deny that it had net losses on the sales of frozen fruit pies during the years immediately following the introduction of the product, or that losses were anticipated in the company's annual budgets. The losses were anticipated and incurred *not only in the Intermountain Market, but throughout the United States.* In addition, strenuous efforts were made to reduce the losses (see pages 8-10, *supra*), and the company's frozen foods division had been brought into "the black" by the time the case was tried. (R. 902)

Actually, Pet never sold its frozen fruit pies, in Utah or elsewhere, at a gross loss—at less than the direct costs of production and distribution. (R. 1023, 1050; Pl. Ex. 7; R. 409, 1926; 1926-2045, *passim,* line entitled "Gross profit.") The net losses realized were attributable to "selling expenses," more particularly to the allocation of a part of the entire company's advertising expenditures to frozen fruit pies. (R. 897-899, 1023)

The following tabulation permits a comparison, for the years 1958 through fiscal 1961, of the total expenditures for advertising and promotion allocated to frozen fruit pies with the total net loss on the pies. In each

year the total advertising expenditures exceed the net loss.

Year	Advertising and Promotion Expenditures for Frozen Fruit Pies[1]	Net Profit or (Loss)[2] on Frozen Fruit Pies
1958	$936,800	($921,270)
1959	866,100	(573,356)
Fiscal 1961		
4/1/60-3/31/61	337,500	(55,463)
Fiscal 1962	42,500	

[1] From D. Ex. A-33; R. 1016, 5826.

[2] From year-end profit and loss statements in Pl. Ex. 7; R. 409, 1926; 1960, 1996, 2026. Net profit or loss for 1962 is not in evidence.

The claim by Utah Pie that Pet's losses were "planned" is based on the fact that for the years in question Pet's annual budgets for the Frozen Foods Division indicated that a net profit on the sale of the frozen fruit pies could not be expected. (Pl. Ex. 7; R. 409, 1926; 1960, 1996, 2026) To equate these unfavorable budget estimates with planned losses, directed at Utah Pie or anyone else, is simply to ignore the truth and to ignore the practice of any well-run business.

Pet, like other business firms, has its accountants prepare annual "budgets" as forecasts of what may be expected, by way of profit or loss, from the sale of its product lines *under what it is believed will be prevailing market conditions.* (R. 895, 920) The budgets are a tool by which management attempts to look realistically at market conditions (including the price at which a product may be expected to be sold), esti-

mated sales volume, proposed advertising expenditures, and other expenses expected to be incurred in manufacturing and distributing a product. (R. 895-897, 920) These figures are weighed to determine whether or not, at the end of the fiscal year, a profit or loss may be expected. (R. 896-897) Sometimes the accountants must prepare several budgets before the Board will approve one as a basis for the upcoming year's operations. (R. 897-898)

If a net loss is forecast or shown on a budget, this does not mean that management is deliberately planning the loss or that the loss is planned for predatory ends. It means simply that the accountants have said, "On the basis of the figures you have supplied us, a loss may be expected." Management's hope is that the loss will not actually come about; or in Pet's case the hope was that, in spending heavily for advertising for a few years, a market would be built for the future. (R. 1023)

Not one bit of evidence, other than the budgets, was introduced by Utah Pie to prove that the losses were "planned" to eliminate or reduce competition in any way or that the "losses" were directed toward Utah Pie.

The Court of Appeals commented on the early advertising and high operating costs as follows:

> "On the other hand, the defendants [respondents here], early entrants into the frozen pie business, had depended on quality, ease and quickness of preparation, and large and expensive advertising campaigns to generate consumer appeal. Their manufacturing, transportation, and selling costs

> were high. Their operations, in some respects, lacked efficiency. They could not change to lower prices to generate consumer appeal for their products, without making major changes and adjustments. They had to reduce costs by curtailing advertising, improving their manufacturing and transportation practices, and promoting efficiency in their operations generally. All this took time and none of them, during the period here involved, reached a position where it could fully compete pricewise with Utah Pie." R. 1499-1500

The Court of Appeals recognized Pet's efforts for what they were—efforts to advertise a new product, and create consumer demand; and to reduce high operating and advertising costs when prices in the market were falling. The Court of Appeals found no evidence of predatory intent or "tactics" as a result of Pet's losses.

(ii) "Industrial Espionage."

Petitioner refers repeatedly in its Brief to Pet's "industrial espionage," both as evidence of Pet's "predatory intent" and as evidence of Pet's interference with Utah Pie's efforts to secure a contract from Safeway Stores, Inc., for the production of frozen fruit pies. (Brief 28; 62, 105) The "industrial espionage" to which Utah Pie refers consists of one visit by a Pet employee, Mr. Schenk, to Utah Pie's plant in June of 1960 in the guise of a "broker from the Northwest." (R. 923, where the date is incorrectly printed as June 15, 1969—924)

After the visit, Mr. Schenk prepared a memorandum for Mr. Dittman to report on Utah Pie's facilities,

(Pl. Ex. 38; R. 386, 2212)[7] Mr. Dittman was Administrative Manager of Pet's Frozen Foods Division (R. 950) and took part in negotiations with Safeway with respect to the BelAir pie. (R. 951) Mr. Schenk's memorandum to Mr. Dittman was highly complimentary of Utah's facilities, though it suggested that "lack of technical quality control personnel" was one point Mr. Dittman might make in talking to Mr. Alan Young of Safeway. (*Id.*, at 2214)

Mr. Schenk, Mr. Dittman, and Mr. Young were presented as witnesses by Pet to testify with respect to the visit and the memorandum. (R. 921-949, 950-963, 1136-1162) The uncontradicted testimony of Mr. Dittman was that the contents of the memorandum were never used in Mr. Dittman's contacts with Safe-

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[7] The memorandum was as follows:

IN UNITED STATES DISTRICT COURT

PLAINTIFF'S EXHIBIT 38

COPY

CC: Mr. L. G. Leutwiler
Mr. Gordon Ellis
Mr. S. P. Harter

TO —Mr. D. F. Dittman
FROM—Mr. Boyd F. Schenk
DATE—July 19, 1960
F. R. —
SUB. —Visit to Utah Pie Company June 23, 1960

On June 23 I visited the Utah Pie Company's only plant at 2323 S. W. Temple in Salt Lake City with Dick Dowell of Cannery Sales Company and Bill Elgrett of Utah Wholesale Groc. Company.

Management—The business is owned and managed by William Rigby. His son, Galen Rigby, is responsible for sales. A brother of the elder Rigby seemed to be plant superintendent.

way or in any other way. (R. 950, 951, 958-961) Mr. Young's uncontradicted testimony was that neither Mr. Dittman nor any other Pet employee had spoken

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Products—Frozen pies—baked unfrozen pies and specialty cakes. They make a baked cream pie but no frozen cream pies.

Marketing—Baked pies and cakes are distributed locally. Frozen pies are sold in the Intermountain area and in California. They have no outlets in the Pacific Northwest but are desirous of some.
Building—The building is of recent block construction with offices and a retail sales room, main production area used also for dry storage and a newly built zero storage room. The son indicated they had an investment of $300,000.

Equipment—Pies are produced on a straight line Colborne manual pie machine, printed cartons are closed in a Marapak H, and pies are conveyed to an Amerio plate freezer. Hot starch method is used with steam kettle for starch which is poured over fruit in tubs. Dough is conventionally mixed.

Capacity—Limiting factor is the plate freezer which has a capacity of 1,400 pies. Freezing takes 90 minutes which would indicate an average speed of 16 pies per minute. The pie machine was operating intermittently with frequent stops to wait for the plate to clear. Rigney indicated they were turning out 10,000 pies per day and running 10 to 12 hours which ties in with the speed of the plates.

Housekeeping and Sanitation.—While the plant was somewhat cluttered, housekeeping and sanitation appeared entirely satisfactory.

Quality—Fruit supply I saw in the plant was all frozen. Apples were steam blanched Pippins from California, boysenberries were Setastopol IQF, cherries were 5 plus 1 sugar packed Utah cherries. I did not see any peaches but was told they buy California Elbertas.

[fol. 2138] *Conclusion*—From a competitive point of view Utah Pie Company has the following advantages:

1. Low overhead due to family management.
2. Non-Union labor force.
3. Freight advantage into intermountain markets.

to him about conditions in Utah Pie's plant. (R. 1137) While Utah Pie now claims that the credibility of these witnesses was a main issue in the case, no attempt was made to impeach their veracity or testimony until the closing argument of Petitioner's

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As they attempt to expand, their Salt Lake City location will become a disadvantage due to the limited market potential. I believe their recent building expansion has created a need for volume in excess of their sales. This is evidenced by their interest in private label and interest expressed to me in outlets in the Pacific Northwest.

Other disadvantages noted were:

1. Less favorable purchasing position due to volume.
2. Higher fruit costs due to lower volume and lack of a capable purchaser.
3. Operation inefficiencies.
4. Lack of high-speed automatic pie machine.

As far as the Safeway production is concerned, I found very few points where they would have a problem with Mr. Young. Some of these are quite easily remedied and I can see why this has been the first processor he felt capable of producing for him in addition to ourselves. The points you might use are:

1. Hot starch method instead of instant.
2. Slower freezing.
3. Lack of technical quality control personnel.
4. Storage of mixed fruit in 55-gallon non-stainless drums prior to being used.
5. Fruit mixture at too high temperature prior to use.
6. No covers on storage vessels or filler hopper.
7. No metal traps in lines.
8. No non-ferrous metal detector.

S/ Boyd

BFS:nmm

(R. 2212-2214)

counsel. (R. 1256-1257) (The remarks of Mr. Lamb, Pet's counsel, quoted in Petitioner's Brief (p. 113) as putting the credibility of the witnesses at issue were the natural reaction of a lawyer incensed by an unwarranted attack on his witnesses.)

This visit by Mr. Schenk to Utah Pie's plant, in the guise of a "broker from the Northwest," was certainly ill-advised. It did not, however, have any effect on Safeway's decision to contract with Utah Pie for the production of BelAir pies. The contention that "*Subsequently* [after the Schenk visit to Utah Pie's plant, emphasis supplied] Pet got the Safeway business (at a discriminatory price) and Petitioner lost out." (Brief 28, citing R. 549-550; Pl. Ex. 42; R. 1054, 2226) is a misrepresentation of the evidence. Pet and Safeway had contracted for the production of some BelAir pies by Pet for Safeway late in 1959, *long before* the Schenk visit to Utah's plant in June 1960. (Pl. Ex. 42; R. 1040, 2226, dated January 1, 1960) *After the visit* Safeway contracted with Utah Pie for the production of BelAir pies in pumpkin and mince flavors in the Thanksgiving-Christmas seasons of 1960 (D. Ex. M-76; R. 843, 5574), and would have contracted with Utah Pie for the production of these pies in 1961, except that Utah Pie refused to adapt its machinery to accommodate Safeway's new carton. (D. Ex. M-84; R. 843, 5584). From this it can be seen that Mr. Schenk's ill-advised visit to Utah Pie's plant was not in any way responsible for Utah Pie's failure to secure more of the Safeway-BelAir business than it did.

The "visit" does not remotely approach the kind of "espionage" involved in the cases cited by Petitioner's Brief, pages 104-105. The kinds of "industrial espionage" used by Standard Oil are not discussed in the

Supreme Court's opinion. *Standard Oil Co.* v. *United States,* 221 U.S. 1 (1911). The combination there in question, however, achieved control of 90 per cent of the production, shipping, refining, and selling of petroleum in the entire industry (*Id.,* at 33); and the combination's activities spanned a period of nearly 40 years. (*Id.,* at 31)

In *American Tobacco Co.* v. *United States,* 147 F. 2d 93 (6th Cir. 1944), numerous "spies" were sent out by three large tobacco companies to check on dealers' prices; dealers selling at prices other than those advertised by the companies "were interviewed"; and retaliatory measures were applied to dealers who refused to reduce their prices. (*Id.,* at 113)

In *United States* v. *General Electric Co.,* 82 F. Supp. 753 (D. N.J. 1949), a company dominant in the industry manufacturing incandescent electric light bulbs (*Id.,* at 900) sent employees into the facilities of other manufacturers, information was accumulated for use by General Electric and Westinghouse "in all parts of the country" not, the Court said, "for the ordinary purpose of sharpening competition but rather designed to reinforce and maintain the domination of the industry; and to inhibit the growth of existing, and abort the birth of, new competition." (*Id.,* at 901) This "espionage" was but one of many activities General Electric was found to be using to "seriously limit domestic competition." (*Id.,* at 900)

In *United States* v. *General Motors,* 384 U.S. 127 (1966), a professional investigator was hired jointly by three local trade associations, with General Motors' collaboration. (*Id.,* at 137) Information compiled by the investigator was used to confront dealers with

evidence that their cars had been purchased through referral services. (*Id.*, at 135) Pet was not dominant in the production of frozen fruit pies. There was no systematic collection by Pet of information about its competitors; and Mr. Schenk's visit was against Pet Milk Company's policy. (R. 949) No use was made of the information Mr. Schenk reported in his memorandum to Mr. Dittman. (R. 950-951, 958-961, 1137) Mr. Schenk's visit is not to be condoned, but it does not rise to the level of "industrial espionage."

"(iii) The Swiss Miss Fighting Brand."

To characterize the Swiss Miss 8-inch, 20-ounce pie, developed by Pet in response to growing consumer interest in "economy" pies (pages 9-10, *supra*), as "'fighting brand'" or "'bogus independent'" (Brief 105-106) is another distortion of the realities, though an interesting resurrection of two venerable antitrust cliches. Until injected into the trial of this suit, the terms "fighting ship" or "brand" and "bogus independent" seem to have all but disappeared from antitrust literature.

"Fighting ship" is a term used in the shipping industry, and it appears in early antitrust conspiracy cases in that industry. The use of "fighting ships" is described in *United States* v. *Hamburgh-American S.S. Line*, 216 Fed. 971 (S.D. N.Y. 1914). Occasionally a shipowner, not a member of the challenged combination of shipowners, would berth his ship near a ship owned by one of the members. (*Id.*, at 73) The non-member owner would offer lower rates than those offered by the member. (*Ibid.*) To eliminate this unwanted competition, the combination would send in a

third ship, ostensibly owned by a member, but in reality owned by the combination. (*Ibid.*) This "fighting ship" would offer rates equal to or less than those offered by the nonmember-owned vessel. (*Ibid.*) A "bogus independent," a term used but not defined in *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43 (1911), can only be, as the name indicates, a subsidiary falsely held out as an independent competitor of the parent company. The use of the "fighting ships" or "bogus independents" was properly enjoined when it appeared. *United States* v. *Hamburgh-American S.S. Line*, 216 Fed. 971, 975 (S.D. N.Y. 1914).

Neither term is applicable to the Swiss Miss pie. The Swiss Miss was not used sporadically by Pet to fight off price competition; and there was no misrepresentation as to who "owned" or produced the pie. The Swiss Miss was developed, because emphasis in the market for frozen fruit pies had shifted from quality to price, to permit Pet to compete in the "economy" market. Pages 9-10, *supra*. This is quite different from the "fighting ships" and the "bogus independents" of early antitrust lore.

6. Competition in the Intermountain Market Among Producers of Frozen Fruit Pies Was Not Lessened by Pet's Activities; and There Was No Reasonable Probability That Competition Might Be Injured.

a. The Court of Appeals Found Absolutely No Injury to Competition.

Assuming *arguendo* that the few occasions on which Pet Milk Company sold frozen fruit pies in the Intermountain Market are cognizable as price discriminations under Section 2(a) of the Clayton Act, Utah Pie Company proved no actual or probable lessening of

competition. On this aspect of the case, the Court of Appeals commented as follows:

> "We conclude that the evidence was wholly insufficient to support a finding that Pet, by price differences or other acts, had substantially lessened competition, or tended to create a monopoly, or injured, destroyed, or prevented competition with it in the Salt Lake City market, or that there was a reasonable possibility that Pet, by price differences or other acts, would do so in the future, or that Pet had taken or would take in the future any appreciable amount of frozen pie business from Utah Pie.[21] "

"[21] * * *

Here, the evidence wholly failed to establish one of the two essential elements of a §2(a) violation charged against Pet, which Utah Pie was required to prove, namely, that the effect of the price differences had substantially lessened competition, or tended to create a monopoly, or to injure, destroy, or prevent competition with Pet, or that the price differences were likely to do so in the future. Utah Pie suffered no competitive injury." R. 1502.

b. The Burden of Proving the Requisite Injury to Competition Was on Utah Pie Company, Plaintiff in the Trial Court.

The burden of proving a substantial lessening of competition or tendency toward monopoly, an essential ingredient of a violation of Section 2(a), is on the plaintiff—be it the Federal Trade Commission in a proceeding before that body, or a private litigant in a treble-damage antitrust action. That this is the plaintiff's burden was clearly stated in *Elgin Corporation* v. *Atlas Building Products Co.*, 251 F. 2d 7 (10th Cir. 1958), *cert. denied* 357 U.S. 926 (1958), as follows:

> "The Clayton Act, as amended [Section 2(a)], does not have the effect of making any and every

differential in price in various areas illegal price discrimination within the intent and meaning of the Act. The Act concerns itself with price discrimination which is reasonably calculated to lessen competition, or tends to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of discrimination of that kind, or with customers of both of them . . . . And the burden rested upon plaintiff to establish price discrimination of that kind and character . . . ." 251 F. 2d, at 11

The Federal Trade Commission has stated the rule in the following words:

"The burden of proof to establish injury to competition is on counsel supporting the complaint. In *A. E. Staley Manufacturing Company* v. *Federal Trade Commission*, 135 F. 2d 453, the court held that proof of discrimination in price is not sufficient; that in addition 'there must be evidence to support a finding and there must be a finding based on that evidence to show wherein competition is substantially lessened and a monopoly fostered.'" *General Foods Corp.*, 50 F.T.C. 885, 889, 1954.

If such evidence is not adduced by the proponent of a complaint, "the proceeding should be dismissed." *The Yale and Towne Manufacturing Co.*, 52 F.T.C. 1580, 1604 (1956).

See also this Court's statement in *Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61, 78 (1953), "that ordinary rules of evidence apply in Robinson-Patman proceedings."

c. The "Competition" Section 2(a) Is to Protect Is the Over-All Competition Among Sellers, Not the Competitive Position of One Seller Against Loss of Business to Another Seller.

Combatants in the market place and litigants in the court room may overlook the fact that the antitrust laws of the United States, including Section 2(a) of the Clayton Act, are designed to preserve *competition*. "Antitrust is a distinctive American means for assuring the competitive economy on which our political and social freedom under representative government in part depend," said the Attorney General's National Committee to Study the Antitrust Laws in its Report of March 1955, p. 2. What, then, is the meaning of "competitive economy," of "competition," that the antitrust statutes are to preserve?

Competition has been defined as the "effort of two or more parties acting independently, to secure the custom of the third party by the offer of the most favorable terms." *Webster's New Collegiate Dictionary* (1956)

> "The struggle between rivals for the same trade at the same time; the act of seeking or endeavoring to gain what another is endeavoring to gain at the same time." *Lipson* v. *Socony-Vacuum Corp.*, 87 F. 2d 265, 270 (1st Cir. 1937)
>
> ". . . the conflict for advantage called competition —the play of the contending forces ordinarily engendered by an honest desire for gain." *United States* v. *American Linseed Oil Co.*, 262 U.S. 371, 388 (1923)

Commenting specifically on the relation between competition and Section 2(a) of the Clayton Act, this Court has said:

> "The heart of our national economic policy long has been faith in the value of competition. In the

> Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.' . . . We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231, 248-249 (1951)

"Antitrust law and economics," the Attorney General's National Committee to Study the Antitrust Laws commented, "are both concerned with business facts—with individual company activities and relations among companies and *their effect upon the market freedom of others and the consuming public.*" Report, p. 315. (Emphasis added.)

d. Criteria for Determining Competitive Vigor in a Market Have Been Established by Federal Trade Commission Cases.

Criteria for determining competitive vigor in a market, or its antithesis, a substantial lessening of competition or a tendency to monopoly, have been established by the Federal Trade Commission. In its *Yale and Towne* opinion (52 F.T.C. 1580), the Commission listed

> "'* * * ease of entry, opportunity for survival, growth, and profit, excellent consumer choice of alternative products, efficiency in production and an active race for improvement of product, redesigning and the introduction of new types with supplier preference by purchasers fluidly responsive thereto, technological advances, and a fluidity

and flexibility of market and of competition therein. . . .'" *Id.*, at 1602.

The Commission found in this action that the "evidence is unanimous that competition in this industry in respondent's line of commerce is active, keen, healthy and increasing * * *." *Ibid.* The complaint, charging a violation of Section 2(a), was dismissed.

Criteria mentioned elsewhere for determining the degree of competition in a market for purposes of Section 2(a) are:

Growth of competitors, *General Foods Corp.*, 50 F.T.C. 885, 891 (1954); *Purex Corp., Ltd.*, 51 F.T.C. 100, 136, 140-143 (1954).

Seller's rate of growth in comparison with the rate of growth of the industry, *E. Edelmann & Co.*, 51 F.T.C. 978, 994 (1955).

No undue mortality among sellers, *Champion Spark Plug Co.*, 50 F.T.C. 30, 38 (1953).

Need to meet the competition of a strongly entrenched regional seller, *Purex Corp., Ltd.*, 51 F.T.C. 100, 136, 142, 146-147, 152 (1954); *Gerber Products Co.* v. *Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 918 (S.D. N.Y. 1958).

Seller's intent to improve its deteriorating market position, *Balian Ice Cream Co.* v. *Arden Farms Co.*, 104 F. Supp. 796, 804-805 (S.D. Cal. 1952), aff'd. 231 F. 2d 356 (9th Cir. 1955) *cert. den.* 350 U.S. 991 (1956).

Dr. Roice Anderson, an economist called as an expert witness by Pet (R. 1057-1058), listed five criteria used by economists to determine whether or not a market is competitive. They are:

The number of firms and brands of a product being sold in the market;

the relative importance of these sellers in terms of how they share the market, how large one is in comparison with another;

ease of entry;

a tendency toward uniform price; and

absence of conspiracy, collusion, on the part of the buyers or any of the sellers. R. 1099-1100.

Within the framework of the criteria applicable to the present situation the vigor of competition in the frozen fruit pie industry in the Intermountain Market must be determined. Pet submits that the entire tenor of the case, and particularly the testimony of Dr. Anderson (R. 1104-1106), establishes under the criteria listed above that competition in this market was vigorous.

e. Importing Criteria From This Court's Opinions in Cases Brought Under Section 7, Clayton Act, Is Unwarranted.

The attempt made in Petitioner's Brief, pp. 66-67 and 78-80, to import criteria established by this Court for determining whether an acquisition may substantially lessen competition in violation of Section 7 of the Clayton Act, is completely unwarranted. Given a company with a share of the market as small as 7.5 per cent (*United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966), given a company of some size, or given a company with more than one product line, a Section 2(a) violation becomes virtually automatic, simply because such a company has the power to lower its prices in one market and not in others.

This is the only meaning to be derived from pages 66-71 of Petitioner's Brief. A fairly large, multi-line company could never lower its price in one market to meet local conditions; and if it cannot do this, it cannot

sell in a market in which, for some reason, prevailing prices are lower than they are in other geographic markets. Usually, the reason prices for a product are lower in one geographical market than in others is that the price in the market is set by a well-established local or regional producer. See the discussion on pages 22-25 of this brief.

Section 2(a) of the Clayton Act is directed at a specific practice, selling to one or more purchasers at a price lower than the price at which goods of like grade and quality are sold to other purchasers, where the effect may be substantially to lessen competition or tend to create a monopoly. Section 2(a) may be violated by a small business entity as well as by a large one. The jury in the present case in fact found that Utah Pie Company had discriminated in price in violation of Section 2(a) in the sale of its Frost 'N' Flame pies at prices substantially lower than the prices at which its Utah brand pies were sold.

f. Utah Pie Presented No Direct Evidence in the Trial Court to Prove the Competitive Injury Required by Section 2(a)

No direct evidence at all was introduced on behalf of the Utah Pie Company to prove the requisite injury to over-all competition among producers of frozen fruit pies in the Intermountain Market. Utah Pie's salesman complained about declining prices (R. 551-552); but two of Utah Pie's witnesses, including the salesman, testified that *selling price for the pies is based on competition in the market.* (Bryant K. Rigby, R. 507-508; Gaylen Rigby, R. 790) In testifying on Utah Pie's alleged damages, Mr. Gaylen Rigby asserted that the company had failed to get as much business as he thought it should have had. (R. 568-

569, 874) None of this is competent testimony to prove a substantial lessening of competition or a tendency to monopoly.

g. What Is It on Which Utah Pie Relies in This Court as Proving the Requisite Competitive Injury?

Utah Pie in the section of Petitioner's Brief devoted to its argument on the merits (Brief 66-121) presents a potpourri of non-law and non-fact to persuade the Court that Pet's activities, and those of the other respondents, had the requisite effect on competition for purposes of Section 2(a), or pose the threat of such an effect. Much of this part of the Brief intermingles claims and evidence against the three respondents in a manner that has no basis in law or fact. For instance, on page 67 of the Brief, Petitioner states:

> "In the four years 1958 through 1961, respondents suffered collective losses of $272,124 on frozen pies in the area where they competed with Utah Pie amounting to about 96% of Utah Pie's total assets of $284,334 in its best year (Compare Pl. Ex. 31; R. 256, 2202 with D. Ex. A-46; R. 997, 5847). Respondents' losses amounted to 396% of Utah Pie's net worth in its best year, or 1,560% of Utah Pie's net income before taxes in its best year (Ibid.)."

Use of the word "collective" can only be intended to suggest that the respondents participated in some way in sharing the losses; and the comparison of these "collective losses" with Utah Pie's net worth or earnings has no possible relationship to any competitive injury.

Even more invidious is the comment on "respondents' collective net profits before taxes," also on page 67 of Petitioner's Brief. Net profits are combined to

demonstrate that the profits were an astronomical 339,500% of Utah Pie's net profits before taxes.

Petitioner links these staggering figures to competitive injury by commenting in the third paragraph on page 67 as follows:

> "Under applicable Clayton Act standards, as construed by this Court in cases under Sections 3 and 7, as well as 2(a), there can be no doubt that the regional price discriminations indulged in by respondents with that kind of market power were reasonably likely to substantially lessen competition or tend to create a monopoly and that Utah Pie is entitled to its judgment."

The truth is that Petitioner recognizes he has no case against Pet, to prove either the elements of a Section 2(a) violation or actual or threatened injury to itself, as required by Section 4 of the Clayton Act. Petitioner hopes by repetition to make false statements believable; and by magnifying isolated incidents, with the aid of antitrust cliches, to create the fabric of a four-year unremitting price war by Pet against Utah Pie. Pet cannot rest on this assertion, however, and though it means prolonging an already long brief, Pet cannot risk failing to refute each of Petitioner's claims. Where possible, and to eliminate repetition, the Court will be referred to earlier discussion of Pet's activities in this brief.

(1) The Mere Existence of a "Large Conglomerate Enterprise" Is Said to be a Threat to Competition (Brief 69).

Pet is not sure what is meant by a "large conglomerate enterprise." The term is not defined in Petitioner's Brief or in the excerpts quoted from Dr. Edwards or Dr. Adams. (Brief 69-71) The term is currently being used in describing mergers that are

neither horizontal (between competitors) nor vertical (the merger of companies in a customer-supplier relationship). See *The Procter & Gamble Company*, 58 F.T.C. 1203, 1204 (1961). Pet produces several lines of foods, in addition to frozen pies, but it was not aware that this made it a "large conglomerate." If it does, and this fact alone constitutes an illegal threat to competition, there is little use to proceed further. Neither the Congress nor this Court has taken such a view, however, and its adoption now would mean the dismantling of many American business firms.

(2) Discriminatory Pricing by Large Conglomerate Enterprises Is Said to Threaten Competition (Brief 71-73).

In this part of its Brief, Petitioner reassembles two of the arguments it has stated at numerous other points in the Brief. The size of the respondents is again stressed. "Surely," it is said, "a jury of reasonable men could conclude that three large conglomerates, all selling at subsidized discriminatory prices in the trading area of a single, small competitor, pose a reasonable likelihood of a substantial lessening of competition, or even of a tendency to create a monopoly." (Brief 72) There is no evidence that Pet was "selling at subsidized discriminatory prices . . ." Far from subsidizing "discriminatory prices," Pet was constantly struggling to eliminate its losses. See pages 8-10, *supra*. There was no "territorial price reduction made aggressively against" a weaker competitor, as alleged. (Brief 73) There was no waging of "price wars," as alleged. (*Ibid.*) There was no showing that a lower price charged by Pet took "business away" from Utah Pie, as alleged. (*Ibid.*) If Utah Pie is referring here to its claim that Pet's sale of BelAir pies to Safeway's Salt Lake Division prevented Utah

Pie from selling Utah brand pies to Safeway, the facts would seem to be just the opposite. Mr. Young, manager of Safeway's Frozen Foods Division, testified that he had told Pet employees that he "couldn't even sell BelAir pies, pumpkin and mince, produced by them in the Salt Lake City market because Utah's price was so low." (R. 1159)

(3) The Court of Appeals, in Assessing Competitive Injury, Is Said to Have "Ignored the High and Apparently Growing Concentration in This Industry." (Brief 78).

Utah Pie cannot have it both ways. It speaks of "high and growing concentration" in the frozen fruit pie industry on page 78 of its Brief. On page 9 it speaks of "testimony that there were over 200 pie manufacturers in the United States at the time of trial (R. 1011)." True, on page 9 Utah states that respondents "were three of the four largest sellers of frozen pies in the nation"; and on page 78 it states that respondents "accounted for more than 66% of all 'quality' pies sold in the United States in the year ending June, 1958 (Pl. Ex. 61, R. 436, 602, 2275, 2294."[8]

Instead of "high and growing concentration" in the industry nationally, the only evidence pointed to a market increase in the number of producers of the

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[8] Pl. Ex. 61 is the study Pet had made of the market for frozen fruit pies at the time its losses on the Pet-Ritz pie were running so very high. See page 9, *supra*. (R. 499-503) It is doubtful that the study, particularly the page cited (R. 2284) substantiates the claims Petitioner makes for it on pages 9 and 78 of its Brief. If it does, neither the page nor anything else in the study indicates that the companies retained any such position in the market for quality pies, and that market, according to witnesses, was declining as the market for price or economy pies grew. Pages 7, 9, *supra*. In any event, absent discriminatory prices, the point becomes irrelevant.

pies—from "15 or 20 companies" in 1955, when Pet began producing the pies, to "upwards of 200" at the time of trial, in 1963. (R. 1011)

Whether there was "high and growing concentration" in the Utah or Intermountain Market can be seen from the testimony of Dr. Roice Anderson, a marketing expert who prepared the Market Share Study and Price Trend Study. (R. 1057, 1058; D. Ex. A-35; R. 1065, 5827) He described competitive conditions in the Intermountain Market in terms that do not suggest "high and growing concentration" among producers of the pies there. (R. 1104-1106) Dr. Anderson found seven producers in the market in 1958, with seven brands. (R. 1104) In 1959, there were seven producers and eight brands; in 1960, nine producers and 12 brands; and in 1961, eight producers and 13 brands. *(Ibid.)* He found that "there is a good deal of competition between brands even of the same firm, because customers generally, consumers, are not aware of who makes the particular brands . . ." (R. 1105)

In addition to the number of firms actually selling frozen fruit pies in the Intermountain Market in 1961 (only one fewer than were selling there in 1958), Dr. Anderson found other food processors "selling other products to" wholesalers in the Intermountain Market. He continued his evaluation of the market as follows:

> "As soon as the price is right to the point where they can compete, they are here ready to sell frozen pie, because they are already here in the market with their organization, through their brokers, through their own representatives, available and ready to sell this product if and when they can meet the competition. So I would say this kind of ease of entry illustrates a high degree of competition." R. 1105-1106.

Utah Pie in discussing the "high and growing concentration" among producers of frozen fruit pies speaks of "a dwindling handful who attempted to sell in Salt Lake City as respondents' discriminations there made competition progressively more difficult from 1959 to 1960 to 1961 (R. 794, 965)." (Prices for Utah Pie's Utah and Frost 'N' Flame prices were making "competition progressively more difficult.") Utah Pie refers to D. Ex. A-27 (R. 893, 5824) as evidence of the "dwindling handful." (Brief 78)

This exhibit shows the number of advertisements for frozen fruit pies, by brand, placed by retailers in the Salt Lake City newspapers, by quarter, for the years 1957 through 1961. The exhibit is based on tabulations (D. Ex. M-55; R. 717, 5528; and D. Ex. M-56; R. 717, 5539) made by a Pet employee from the files of the newspapers. (R. 891) The exhibit is indicative of what brands of pies were being sold in the Salt Lake market during the years it covers, because newspaper advertising is essential for the retail sale of frozen fruit pies. (R. 696, 712) If a brand is not advertised, it will not be sold.

Numerical data of the kind contained in D. Ex. A-27 may be read in numerous ways. Petitioner has concluded that the exhibit demonstrates that

> "respondents were able to identify only 19 brands advertised at retail in Salt Lake City in the calendar years 1957 through 1961. Of these brands 9 were packed either by petitioner or respondents (Ibid.). Of the remaining 10 identified brands, only 4 were advertised in both 1960 and 1961 (Ibid.). This almost total exclusion of competition from Salt Lake City is hard to explain on the basis of geographical factors . . . ." (Brief 78-79)

Pet is not sure Utah Pie's count is correct, for it can find only eight brands produced by petitioner and respondents advertised in the years 1957-1961; and one of these, the Pet-Ritz brand, was not advertised after the first quarter of 1960.

Accuracy aside, Pet finds other indicators in the exhibit. The Utah brand pie was advertised three times in the last quarter of 1957, the year of its entry into the market; 27 times in 1958; and 47 times in 1961. The Pet-Ritz pie was advertised seven times in 1957; 26 times in 1958; and not at all in 1961. Five brands were advertised during the first quarter of 1958; and nine brands were advertised in the last quarter of 1961, with five advertisements appearing during that quarter not identifying the brand. (D.-Ex. A-27; R. 893, 5824)

The Court is invited to examine this and the underlying exhibits, and to study the Court of Appeals' analysis of it, R. 1455-1457.

(4) The Court of Appeals Is Criticized for Considering "Each Respondent's Price Discriminations as if They Had Occurred in a Vacuum." (Brief 30).

What the Petitioner apparently is taking issue with here is the Court of Appeals' separate analysis of the evidence presented with respect to each respondent's pricing and other activities (R. 1500); and the Court's conclusion that none of the respondents individually had engaged in discriminatory pricing, in violation of Section 2(a). (R. 1502-1503, 1504-1505, 1507-1508) Pet cannot conceive of any other approach that would have accorded it and the two other respondents due process of law. The refusal of the trial judge to grant defendants (respondents here) separate trials of the Section 2(a) charges was assigned as error in the Court of Appeals. (R. 11) Because the court reversed

the judgments against respondents for insufficiency of the evidence, it did not consider this and other grounds asserted for reversal. (R. 1453)

The situation when discriminatory pricing is at issue is not analogous to the merger cases, in which this Court has considered "trends toward concentration through mergers of firms not parties to the suit." (Brief 80) In fact, to suggest, as Petitioner does (Brief 80), that "each respondent's discriminations occurred in a context of *similar discriminations by the other respondents*" suggests that they were meeting one another's prices in the Utah market.

Respondents were not shown to be selling at the same prices. Their prices in the Intermountain Market were actually quite different. See D. Ex. A-38; R. 1100, 5845. There is nothing in the record remotely suggesting that Pet, even if it were selling at discriminatory prices in Utah, knew that either Carnation or Continental was selling at "discriminatory prices."

(5) Discriminatory Price Cuts by a Major Competitor Are Said to Injure a Competitor by "Depressing Market Prices as Well as by Diverting Business." (Brief 81).

Petitioner's Brief states, at page 81,

> "But local price-cutting also tends to force the local seller to meet the discriminatory price, and may result in his destruction even though he keeps the business, if the price is low enough. See e.g. *American Tobacco Co.* v. *United States*, 221 U.S. 106, 182, 31 S. Ct. 632, 648."

How can this statement be made in relation to this case when Utah Pie's prices were always well below Pet's prices for comparable pies (8-inch, 24-ounce pies). (D. Ex. A-38; R. 1065, 5845) Petitioner claims

(Brief 82) that the price of Utah Pie's Frost 'N' Flame brand pie "was *not* always lower than Pet's 'Swiss Miss'" pie. This may be true pie for pie, for some of the less popular pie flavors: cherry, boysenberry, and peach. (Cf. R. 5841 and 5843 of D. Ex. A-35; 1065, 5827) The statement overlooks the fact that petitioner does not claim any discriminatory pricing of the Swiss Miss pie (Brief 27); and the fact that the Swiss Miss pie weighed 20 ounces (R. 972), while the Frost 'N' Flame pie weighed 24 ounces. (R. 554) The few cents differences in prices never reflected the difference in weight. Ounce for ounce, Utah's Frost 'N' Flame pie always sold for less than the Swiss Miss pie. (D. Ex. A-35; R. 1065, 5827; 5841, 5843) If any pie depressed prices in the market it was Utah's Frost 'N' Flame pie, and to a lesser degree its Utah brand pie. (R. 1458, 1490, 1499, and the pages of the Record cited by Petitioner's Brief, p. 82, where it is said that the "Court of Appeals repeatedly emphasizes that Utah Pie's prices were the lowest in the market.")

Petitioner asserts at the bottom of page 82, that the "legal fallacy is in assuming that a discriminatory price reduction *which does not undercut a competitor* cannot be unlawful, or at least cannot depress the competitor's price . . . that a 'premium' brand, such as respondents' nationally advertised labels, may be in competitive equilibrium with lesser known brands at a substantially higher price." This statement is effectively refuted by the fact that Pet's sold at "substantially higher" prices in the Intermountain Market than Utah's brands, and by the fact that the Pet-Ritz pie at the higher price was disappearing from the Salt Lake City market in 1961. (D. Ex. A-35; R. 1065, 5827; 5832)

(6) Evidence of Intent to Destroy a Competitor Is Said to Support a Jury Finding of an Incipient Threat to Competition (Brief 95-106).

In this portion of its Brief, Petitioner again repeats for the Court assertions that have been made and reiterated many times before—the alleged discriminatory pricing (refuted at pages 45-52, *supra,* in this brief); the "industrial espionage" (see pages 58-64, *supra*); and the Swiss Miss "fighting brand" (see pages 64-65, *supra*).

The only point made by Petitioner in this portion of the Brief that has not been dealt with earlier is the discussion of the use of delivered prices. (Brief 96-97) The attitude of Petitioner is analyzed elsewhere. (See pages 91-100, *infra.*)

(7) The Court of Appeals Is Said to Have Ignored Both the Facts and the Applicable Law in Assessing the Extent of Respondents' Price Discriminations (Brief 83-94).

This portion of Petitioner's Brief repeats much of what has been asserted before on behalf of Utah Pie and the respondents' alleged violations of Section 2(a). Pet's "highly discriminatory" price for "massive quantities" of BelAir pies is referred to on pages 84 and 90-94. Pet discusses the BelAir prices in this brief at pages 45-49, *supra,* and what is said there need not be repeated here. On the question of "massive quantities" see the following tabulation:

Number of Dozen Frozen Fruit Pies
Sold in the Intermountain Market, 1958-1961
BelAir (Produced by Pet), Utah Brand,
and Frost 'N' Flame

	1958	1959	1960	1961
BelAir	—	25,462.5	22,694.0	14,897.5
Utah Brand	37,969.5	38,338.0	36,759.5	46,016.0
Frost 'N' Flame	—	34.0	37,189.5	48,963.5

(D. Ex. A-35; R. 1065, 5827; 5829-5832).

Also discussed before is the question of what price is to be considered for purposes of Section 2(a). (Brief 85-86) See pages 32-33, *supra*. Pet reaffirms the position taken there: that the prices actually shown on the invoices—list prices less the promotional or off-invoice allowance deducted at the time of sale—are the prices to be considered.

The contention that Pet and the other respondents "should have adhered to a 'one-price' policy" is discussed later. See pages 96-98, *infra*.

There remains only the question of cost justification for the quantity discounts. This is the first time the question of cost justification of the discounts has arisen. The discounts appear on Pet's list prices, which are not the price at which sales of pies are made. (Pages 25-26, *supra*.) Eleven invoices in Pl. Ex. 121 (R. 996, 5250; 5307-5317) indicate sales of Swiss Miss pies, combined with BelAir pies to make full-truck loads, but no comparsion is made of the prices for the Swiss Miss pies with other prices. Furthermore, Utah Pie conceded that there was no discrimination in the sale of the Swiss Miss pie by Pet in the Intermountain Market. (Brief 27) There would seem to be no reason for justifying the quantity discounts, since sales were not made at these list prices.

There is no need to refute point by point the repetitious statements made in pages 106-121 of Petitioner's Brief, under the heading "The Court of Appeals Invaded the Jury's Province by Accepting and Relying Upon Controverted Evidence and Inferences Unfavorable to Utah Pie." Pet believes enough has been said for the Court to evaluate this part of Petitioner's Brief.

There remain two areas to be covered. One is the evidence of damage to Utah Pie during the years 1958 through 1961 and the possibility of damage in the future. The other is what Pet considers to be the real issue in this case—the ability of a national seller to compete in geographical regions occupied by a strong local or regional producer.

7. Utah Pie Showed No Loss or Threatened Loss to its Business or Property by Reason of Any Activity of Pet; Its Claim for Damage Was Based on Fallacious Legal Grounds.

The language of Section 4 of the Clayton Act (38 Stat. 731; 15 U.S.C, § 15) makes it clear that a plaintiff in a treble-damage action must "be injured in his business or property by reason of" an antitrust violation, if damages are to be awarded. The requirement for showing "threatened loss or damage," to secure an injunction under Section 16 of the Clayton Act (38 Stat. 737; 15 U.S.C. § 26) is similar.

A treble-damage plaintiff must prove that violation and a causal connection between the violation and the loss or threatened loss to its business. If the losses or failure to make additional profits are attributable not to the antitrust violation but to the plaintiff's own business judgment or manner of operating its business, there should be no recovery of damages and no injunction. In addition to the sufficiency or insufficiency of the evidence to prove a violation of Section 2(a) by Pet, the sufficiency of the evidence of injury or threatened injury to Utah Pie by reason of such violation should be studied.

The elements on which Utah Pie relies to prove that Pet's alleged "price discriminations had an injurious impact" on it are stated on pages 54-57 of the

Brief. They are "(1) loss of profits due to depressed prices; (2) loss of profits due to reduced volume; and (3) injury to the good will value of its business." (Brief 54)[9]

[9] In addition to summarizing the testimony of Mr. Rigby, Utah Pie's sales manager, on page 119, Petitioner paraphrases testimony of Dr. Anderson, who directed the making of the Market Share and Price Trend Study (D. Ex. A-35; R. 1065, 5827) Dr. Anderson, according to the Brief, "testified that the loss of 'name' brand products, as distinguished from private label, could be a competitive injury (R. 1119)." Petitioner's Brief then emphasizes the "loss of market share of the 'Utah Pie' brand."

Dr. Anderson's testimony does not indicate that any "loss of market share of the 'Utah Pie' brand" was caused by Pet. His testimony (R. 1118-1119) was as follows:

By Mr. Alioto:

Q. I take it, in connection with the competitive factors, Dr. Anderson, that there is a distinction, in terms of the good of an independent firm, there is a distinction between it enjoying a brand business as against a private brand business?

A. Yes, I am certain of this.

Q. And to the extent that there is a loss in market share in its brand business, to the extent that that can be demonstrated, that is definitely a competitive injury to that business, isn't it?

A. I don't think this necessarily follows.

Q. In other words, you don't think that an injury to the brand business of an independent doesn't necessarily follow that that is an injury that injures, that damages, that business competitively?

A. As I pointed out in my data here, and I will take the Swiss Miss as an example, I would say that the introduction of Swiss Miss by Pet Ice Cream Company, or Pet Milk Company had more damage on their—well, cut into their market for Pet-Ritz more than perhaps any other product on the market. At least they lost this and gained the Swiss Miss. But, by the same token, any private label might introduce their own private brand, their own house brand. A company might introduce additional brands either under contract or any other arrangements which might actually take sales from their own house brands.

Q. Perhaps I didn't make my question very clear then. I am talking about the Utah Pie Company.

A. You are talking about Utah brand of Utah Pie Company?

These points may be briefly answered as follows:

(1) Utah Pie was itself responsible for the downward trend in prices for frozen fruit pies in the Intermountain Market. Pages 13-16, *supra*.

(2) Utah Pie's sales of frozen fruit pies were not reduced in volume (they rose from 68,604 cases in 1958 to 248,114 cases in 1961 (Pl. Ex. 82, R. 527, 3616), although Utah's percentage share of the market did decline.

(3) It is difficult to see how a firm whose business increased almost fourfold during a period of four years, could have lost good will, though Mr. Gaylen Rigby did so testify. (Brief 119)

Assuming that Utah Pie lost profits "due to depressed prices" and due to reduced volume, "to what degree was Utah Pie's failure to increase its profits through higher prices and increased volume attributable to Pet's prices in Salt Lake City? To what degree is the failure attributable to Utah Pie's own business decisions?

Q. I am talking about the Utah brand of the Utah Pie Company.
A. Okay.
Q. And I am talking about that Utah brand in contradistinction to a private label brand. You would agree with me, would you not, Doctor, that if there is any substantial loss of market share by an independent of its brand product, that that could be an injury, a competitive injury, to that business?
A. Could be.
Q. You would agree with that?
A. But not necessarily.
Q. All right, but it could be.
A. Could be.

What Dr. Anderson was saying was that the introduction of a private brand (for example, Utah's Frost 'N' Flame brand) could reduce the amount of sales of the producer's "name" brand, i.e., Utah Pie's Utah brand.

When Utah Pie began the production of frozen fruit pies in August 1957, the decision of its sales manager was to price the pies "a few pennies under our competition." (R. 878) In January 1958, the price of the Pet-Ritz apple pie (the only brand Pet had in the market at that time) was 42 cents per case of six pies, or 84 cents per dozen, higher than the price of the Utah Pie brand apple pie (Utah Pie's only brand). (Page 14, *supra.*) As far as Pet's price was concerned, Utah Pie could have set its price at a much higher level. This difference, though the amount of difference varied, continued throughout the subsequent four years. (D. Ex. 38; R. 1100, 5845; D. Ex. A-45; R. 987, 5846)

When Utah Pie began to produce the Frost 'N' Flame pie on a continuing basis, in January 1960, the price of the Frost 'N' Flame apple pies was 56 cents per case of six pies below the price of the Pet-Ritz apple pie; 14 cents per case below the price of Pet's lighter Swiss Miss pie; and 29 cents per case under the f.o.b. price at which Pet was selling the BelAir apple pie to Safeway. (Page 14, *supra.* D. Ex. A-35; R. 1065, 5827; 5838, 5841, 5843, 5844)

Had Utah Pie wanted to sell its pies at prices higher than it actually sold them, it could certainly have done so insofar as Pet's prices were concerned.

What of its failure to increase its sales more than it actually did? Instead of feeling it should have increased its sales more than it did during the four years, Utah Pie should be pleased that an almost fourfold increase was accomplished with a minimum effort—with the addition of no additional equipment (R. 524), with only one salesman working in nine states (R. 522, 551, 813-814. Pl. Ex. 82; R. 527, 3616), with a mini-

mum expenditure for advertising (page 18, *supra*), An additional salesman or two and additional expenditures for advertising might have increased Utah Pie's volume more than the volume actually increased, and thus have increased profits. (Or additional advertising expenditures might have resulted in losses, as did Pet's expenditures for advertising. Pages 6-9, *supra.*) The decision not to make these additional sales efforts were those of Utah Pie's management, not affected by Pet's prices or other activities.

The decision not to adapt Utah Pie's quality control procedures to meet Safeway's requirements was also that of Utah Pie's management, and the reason Utah Pie did not obtain more of the Safeway-BelAir business than it did. (Page 19, *supra.*)

Another aspect of Utah Pie's claim that it was damaged is not as clearly presented to this Court as it was in the trial of the case. On page 74, Petitioner's Brief takes issue with the Court of Appeals' statement that " 'a contention that Utah Pie was entitled to hold the extraordinary market share percentage of 66.5, attained in 1958, falls of its own dead weight . . . .' (R. 1507)."

"There is nothing in the record," Petitioner's Brief continues, "to support a suggestion that the jury concluded that Utah Pie was 'entitled to hold' any particular market share . . ." (Brief 74)

In the trial of the case, Utah Pie's assessment of the profits it had lost of the damages it had suffered as a result of the respondents' activities was based squarely on the claim that it should have maintained the percentage share of the market that it had in 1958,

in relation to the defendants. Mr. Gaylen Rigby, Utah Pie's sales manager (R. 522), testified as follows:

> "A. With the increasing of business and the greater amount of people buying frozen pies, that is my conclusion, that the Utah Pie label should have stayed within a reasonable amount, a reasonable amount of sales each year; percentage of market share should have stayed about the same.
>
> "Q. [by Mr. Schafer] A reasonable percentage of the market share?
>
> "A. About the same as it was in the previous years. It should have stayed about the same, should not have decreased.
>
> "Q. The year which you used as your base was 1958, is that correct?
>
> "A. That is true.
>
> "Q. And in that year you had 70 per cent of the business, is that correct?
>
> "A. That's what the survey shows." R. 874.

The certified public accountant who prepared exhibits (R. 570) to demonstrate Utah Pie's "losses," testified with respect to these exhibits, particularly Pl. Ex. 95 (R. 574, 4591). The exhibit is entitled "Summary of Estimated Gross Profits, Revenue and Goodwill Lost by Utah Pie Company Based on Estimated Sales Lost to Defendants and From the Effect of Depressed Prices." (R. 4591) Item A of the exhibit is as follows:

> "Estimated gross profit on additional frozen fruit pies Utah Pie Company would have sold if 1958 market position in relation to defendants had been maintained" *(Ibid.)*

The accountant, Mr. Grant Caldwell (R. 233), questioned by Utah Pie's attorney after the exhibit had been received in evidence, testified as follows:

> "Q. [by Mr. Alioto] Now, Mr. Caldwell, speaking loud enough so that all of the attorneys in the case can hear you, would you be good enough to . . . tell us generally what this Exhibit 95 is . . .
>
> "A. Under 'Item A' as shown on the study, we determined the percentage of the market for other than private label pies that was sold by each of the defendants and the plaintiff. For each of the years 1958 through 1961, we determined the percentage increase or decrease in that market for each of the defendants and the plaintiff. We then used 1958 as a base year.
>
> "If Utah Pie Company had maintained its market position which it had in 1958 through the years 1959, 1960, 1961, in relation to the other defendants, then there would have been an increase in the number of dozen sold . . . ." R. 574.

Utah Pie's "percentage of the market for other than private label pies" in 1958 was 70.41 (Pl. Ex. 96; R. 578-579, 4592; 4593). Utah Pie's percentage share of the total market (including frozen fruit pies made by producers other than the parties to the action) was 66.5. (D. Ex. A-35; 1065, 5827; 5829)

There may be nothing in the Record to "support a suggestion that the jury concluded Utah Pie was 'entitled to hold' any particular market share" (Petitioner's Brief 74); but there is certainly enough in the Record to demonstrate that Utah Pie claimed it was entitled to maintain a 66.5 or 70.41 percentage share of the market in and around Salt Lake City.

8. The Real Issue in This Case Is the Ability of a National or Multi-Regional Seller to Adapt Its Prices and Products to Meet Local or Regional Competitive Conditions.

The real issue in Utah Pie's action against Pet Milk Company and the other two respondents, from the trial of the case to this Court on certiorari,

> *is whether or not a company that distributes a product in more than one geographic market can, without violating Section 2(a) of the Clayton Act, as amended, 15 U.S.C. § 13(a), reduce the price of that product in one market, in an attempt to compete with prevailing local prices, without reducing the price of the product to that level in all markets in which it sells the product.*

In the trial court, Utah Pie's counsel repeatedly argued to the jury and to the court that Pet should, if it wanted to compete in the Utah or Intermountain Market and meet the prevailing prices there,

(1) build a plant in Salt Lake City, to enable it to save on freight costs incurred in shipping its frozen fruit pies to Salt Lake from Fresno;

(2) sell its frozen fruit pies at a uniform delivered price throughout the United States, the delivered price at which it was selling the pies in Utah, if that were Pet's lowest price anywhere;

(3) reduce its price in Utah, provided it does not violate Section 2(a).

In his closing argument to the jury, Utah Pie's counsel said,

> "Sure, we want to compete, and everybody is free to compete. Everybody is free to build a competitive pie company, in Ogden, in Salt Lake, in Denver, in Montana, any other place. And even the national companies are free if they do not violate the price discrimination and have that low

price where the competitor is. The national companies are free to come in here at the lowest price they want to come in on, providing they do it everywhere, provided they do it nationally. And this is the policy of the law." R. 1344[10]

The repeated emphasis on the use of delivered prices in a distant market that are the same as or lower than the delivered prices in the market near the plant also put at issue the right of a national or multi-regional seller to go into a distant market and meet competitive conditions there. The idea that such pricing is "unnatural" was stressed frequently throughout the trial. (R. 64, 65, 67, 1129-1130, 1235, 1269, and 1280).[11]

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[10] See also R. 1263-1264, 1281, and 1110, where Utah Pie's counsel argued to the court as follows:

"Again, nobody is contending that this measure of damages evinces some kind of a desire to build a Chinese wall around Salt Lake City. Nobody is contending that. Anybody was free at any time during this period of time to come into Salt Lake City, build a pie plant directly across the street from the Utah Pie Company and merchandise his pies on a unified price system without discrimination and on the basis of efficiency or anything else actually run the Utah Pie Company out of business. Anybody has always been free to do exactly that. Anybody has always been free throughout this period of time to reduce his price level uniformly throughout the United States if he wanted to enter a great big portion of the Utah Pie market. Anybody was absolutely free to do that at any time during this litigation." R. 1110.

[11] That this repetition impressed the jury is indicated by a question asked by the jury shortly before a verdict was reached. The question was:

"'A point of dissension has arisen.' Namely, is it unlawful for a pie producer to sell its pies near its plant and sell the same pies in another area at a lower price? In other words, is it unlawful for a company to sell, for example, pies in the Los Angeles market at $4 per dozen and at the same time sell pies in the Salt Lake area at $3 per dozen, the Salt Lake price not undercutting the competitor's prices in that area?'" R. 1396.

The issue is put before this Court by the portion of Petitioner's Brief entitled "Discriminatory Low Prices Charged by Respondents at Places Distant From Their Plants Are Evidence of Predatory Intent." (Brief 96) On pages 96-97, Petitioner's Brief states:

> "In this case, respondents 'force fed' their pies into Utah Pie's trading area with delivered prices which necessarily entailed substantial freight absorptions of $.30 to $.35 a dozen (on a product usually priced at around $4.00 per dozen) just to sell pies at the same price in Salt Lake as they sold at the doors of their California plants (Pl. Ex. 28; R. 261, 2184; R. 254, 663, 770)."

(Petitioner appears to have taken an inconsistent position here. Throughout the Brief and in the heading for this portion of the Brief, p. 96, Petitioner has complained that the price in Salt Lake was *lower* than the price at the plant, in California. In the statement quoted above Petitioner says that the price in Salt Lake was *the same as* the price in California, though an additional freight charge was incurred in shipping the pies to Salt Lake City. The effect is the same. Petitioner is attempting to persuade the Court that a seller cannot, under any circumstances, ship its product to regional markets away from its plant without charging the plant price plus freight, regardless of the differing competitive conditions in the different markets.)

On page 97 of Petitioner's Brief, testimony of a Dr. Anderson is summarized as follows:

> "Respondents jointly hired Dr. Anderson as an economics expert (R. 1087). He testified, on cross-examination, that lower prices at points distant from a respondent's plant were 'unnatural' (R.

> 1130). He said that in these circumstances declining prices in Salt Lake were the result of predatory pricing as 'one of the possibilities' (R. 1115)." Brief 97. (See also Brief 32.)

Actually, this was not Dr. Anderson's testimony.[12]

Petitioner has said and will again say that Pet may reduce its price in the Intermountain Market, where it competes with Utah Pie, without reducing its prices elsewhere provided Pet does not violate Section 2(a): that is, provided the reduced price in the Intermountain Market does not injure competition in that market. This proviso is without substance, however, for given the slightest evidence of a few sales in Utah at prices lower than the prices charged elsewhere, the inference of competitive injury, sufficient to meet the requirements of Section 2(a), becomes almost automatic. It may be inferred from the mere size of the seller (Brief 71-72); from the characterization of isolated transactions that have nothing to do with prices

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[12] As reported on page 1130 of the Record, Dr. Anderson was being questioned by Utah Pie's counsel about a "two-price system." A study of the Record at page 1130 will reveal that Dr. Anderson did not testify that such price differences were "predatory." On page 1114, Dr. Anderson was questioned on the "erosion of the price of the Utah Pie Company, and whether or not it could have resulted from "this Standard Oil type of competition." Dr. Anderson said he did not think the "lower price is . . . necessarily an erosion of price . . . ." He went on to comment on the "phenomenal increase in sales that have taken place in the market . . . in largt part due," he said, "to the fact that the prices have generally been decreased over the period of time, of all firms, and particularly the Utah Pie." R. 1114-1115. He was then asked whether it was "not possible that this price erosion could have occurred because of the intense type of competition evidenced in the Standard Oil case about which I have talked to you? Isn't that one of the possibilities?" "It is one of the possibilities," Dr. Anderson answered. R. 1115.

(the repeated reference to Pet's "industrial espionage," Brief 28); from the characterization of Pet's honest efforts to advertise a product and to correct a badly deteriorating internal financial situation (referred to as Pet's "planned losses," Brief 16); and from counsel's characterizations of honest efforts to analyze a market and to meet consumer preferences (referred to as Pet's use of a "fighting brand," Brief 31). Predatory intent toward the local or regional producer can even be inferred from the fact of selling at a lower price in the regional market, without regard for prevailing prices there. (Brief 32, 96-97)

Apart from the unfortunate visit by Mr. Schenk to Utah Pie's plant (discussed fully in this Brief, pages 58-64, *supra*),

> if a national seller cannot, because of its size in comparison with a local company, attempt to meet the local company's prices in the local or regional market;
>
> if the national seller cannot make honest efforts to analyze its operations at the beginning of each year and budget its resources realistically, even though "losses" may be foreseen on some product lines;
>
> if the seller cannot adapt its product lines to what it thinks, rightly or wrongly, are the consumers' preferences;

the national seller simply cannot sell in any regional market where there is a local or regional producer.

> *If the market is one in which a local producer already operates, a national or multi-regional seller cannot go into the market.*
>
> *If the market is one into which the local producer follows the national or multi-regional seller*

(the situation in this case), the national seller must withdraw when the local producer becomes established.

The first of Petitioner's alternatives (page 91, *supra*), that Pet build a plant in Salt Lake City if it wants to compete with Utah Pie's prices, is suggested to this Court on page 75 of Petitioner's Brief. The Brief states that "Utah Pie had no power to exclude others from selling in Salt Lake, or even building pie plants across the street from its own." There is nothing in the antitrust laws to prevent a national or multi-regional seller from building plants in different localities, but there is nothing to *require* that a firm build a plant in every geographic market where it wants to compete with a local producer. To build plants in every such geographic market would be economically unsound and would prevent sellers from competing in markets where they have no production facilities.

That a producer who enters more than one geographic market should reduce its price in all markets (Petitioner's second alternative, page 91, *supra*), if it wants to meet competitive conditions as they exist in one market is suggested in Petitioner's Brief at page 93. Petitioner there states that "absent their ability to prove either a cost justification, or a 'good faith meeting of competition' defense, or a 'changing conditions of the market' defense," Pet and the other respondents "should have adhered to a 'one-price' policy," throughout the United States or in all markets in which they sold frozen fruit pies.[18]

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[18] Here again is one of Petitioner's less-than-forthright handling of the evidence, the law, or a commentary. In footnote 9, pages 93-94 of its Brief, Petitioner states that the " 'changing conditions

Petitioner's treatment of Pet's evidence on its attempts to adapt its operations and sales activities to

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of the market' " proviso of Section 2(a) of the Clayton Act has been "understood, and held, to refer only to 'situations similar' to the unloading of seasonal and obsolescent or perishable and deteriorating merchandise . . ." The Report of the Attorney General's National Committee to Study the Antitrust Laws (1955) 178 is cited as authority for this statement. Petitioner's statement does not accurately reflect the Committee's views on the proviso. Those views were as follows:

> "The 'changing conditions' proviso has figured in only two recorded litigations. In one, judicial dicta intimate that price fluctuations in wheat might constitute a sufficient 'changing condition affecting the market for' flour to exempt an otherwise unlawful price differential in flour sales. More recently, however, an appellate court, by analogy to the examples enumerated in the statutory text, restricted the proviso to situations 'similar' to the unloading of seasonal and obsolescent or perishable and deteriorating merchandise, or forced sales compelled by judicial process or discontinuance of a merchant's business line. In rejecting a local boycott of the seller's goods as insufficiently 'similar' to meet the proviso's tests, the Court failed to establish criteria for measuring the requisite degree of similarity. Consequently, judicial interpretations of this undeveloped 'changing conditions' proviso have not yet crystallized.
>
> • • •
>
> "Because we view the 'changing conditions' proviso as designed to promote competitors' freedom to react realistically to the spontaneous movements of a dynamic market, a broad interpretation of this provision would, in our opinion, comport best with the Congressional intent as well as broader antitrust objectives. We believe, therefore, that an independent and significant meaning might be accorded to the statutory phrase 'changing conditions affecting the market' to which a competitor might respond by revising his price—wholly apart from the 'marketability of the goods concerned,' the second statutory factor which the enumerated examples in the proviso illustrate. In any event, we view the significant common denominator in these far from homogeneous examples *not* as a deterioration of the seller's goods or business position, but as a *spontaneous shift in market conditions beyond the seller's*

the realities of the market strongly suggests that the ability to prove these defenses would always be "absent."

If none of the defenses of Sections 2(a) and (b), particularly the "changing market conditions" proviso of 2(a), permits a national or multi-regional seller to sell at a lower delivered price in one market to meet prevailing prices there, without lowering its prices throughout the United States;—that is, if Section 2(a) requires that a manufacturer sell at a uniform delivered price in all markets in which it sells, regardless of different competitive conditions in different geographic markets—Section 2(a) *has become a national price-fixing device.* A seller operating in different geographical markets must sell in all markets at the lowest price set by a local or regional producer, unless the seller is to stay out of that producer's geographical market.

The Court of Appeals for the Tenth Circuit met the issue as follows:

> "The fact that a seller doing an interstate business lowers his price in one market area, without making a corresponding reduction in all other market areas in which he sells, is not in and of itself a violation of § 2(a). That is especially true where the market areas involved are distinct, disconnected, unrelated, and heterogeneous, as are

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control. The proviso should enable a seller to reflect such commercial adjustments in good faith by revised price quotations on short notice, though this may incidentally prejudice some customers who bought at less favorable prices in the immediate past. We equally recommend a realistic interpretation to protect a seller's flexibility in adapting his prices to perceptible market shifts, whether already under way or only impending." Report, 178-179. (Footnotes omitted.)

the areas involved in the instant case. (R. 1494.) (Footnote omitted.)

* * *

"As we have heretofore stated, selling at lower prices in the Salt Lake City market than in other market areas in and of itself is not a violation of § 2(a).

"We do not think Congress intended that nation-wide sellers in different, separate, distinct, heterogeneous and unrelated markets, with different competitive conditions, must sell at the same price levels in each of such markets. However, we think it did intend that such a seller should not indulge in price differences that had a reasonable possibility of substantially lessening competition or tending to create a monopoly, or to injure, destroy, or prevent competition with a person who grants or knowingly receives the benefit of such price differences. But it did not intend to proscribe a seller from fairly meeting competition." (R. 1498-1499.)

In a similar situation, the Court of Appeals for the Ninth Circuit rejected a construction of Section 2(a) that would have required a multi-regional seller to charge a uniform delivered price in all its markets. The court said:

"Plaintiff's principal contention on appeal seems to be that, because they had an established price in the Los Angeles area at which they were making money, no one could cut the prices for the benefit of the public in that area unless it cut prices in every other area in which it did business. The implication of the arguments of plaintiffs is that prices can never be lowered by a concern, which does any interstate business, in one area if it fails to make a corresponding cut in every locality where it does business. This postulate need not be de-

bated under the facts here. It may be said Congress did not put a floor under all existing prices so these could never be lowered by a firm doing interstate business. Certain economists contend for this construction. Such a situation would not be in the public interest. The people are interested in obtaining goods at the lowest price possible, if competition is not vitally affected thereby. The assumption suggested above would ring the death knell of competition." *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 367 (1955), *cert. den.* 350 U.S. 991 (1956).

The issue has never been squarely before this Court. In *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), remanded for further proceedings, 289 F. 2d 835 (2d Cir. 1961), the Court held that reducing a price in one geographic area, while maintaining higher prices elsewhere, might violate Section 2(a) of the Clayton Act, if the requisite competitive injury were shown in the area in which the price was reduced. 363 U.S. at 542-545. The Court did *not* hold, however, that the mere reduction of a price in one geographical market without more violates Section 2(a). *Id.*, at 553. On remand, the Court of Appeals for the Second Circuit found that the requisite competitive injury had not been proven. 289 F. 2d at 840.

9. Pet's Sales Activities in Utah Are Not Like the Activities Found in the "Predatory" Price Discrimination Cases.

Several cases, some cited in Petitioner's Brief, are what may be called classic examples of "predatory" discriminatory pricing, in violation of Section 2(a) of the Clayton Act. These are *Moore* v. *Mead's Fine Bread Co.* (190 F. 2d 540, 10th Cir. 1951; 208 F. 2d 777, 10th Cir. 1953; rev'd, 348 U.S. 115, 1954); *Porto*

Rican Tobacco Co. v. *American Tobacco Co.* (30 F. 2d 234, 2d Cir. 1929); *E. B. Muller & Co.* v. *F.T.C.* (142 F. 2d 511, 6th Cir. 1944); *Maryland Baking Co.* v. *F.T.C.* (243 F. 2d 716, 4th Cir. 1957); and *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.* (269 F. 2d 950, 10th Cir. 1959).

In each of these cases the company charged with discriminatory pricing in one geographic area dropped its price in that area, sharply below the price at which it had been selling in the area, and sharply below the price at which it continued to sell in other geographic areas. 30 F. 2d at 236; 190 F. 2d at 541; 243 F. 2d at 717-718; 269 F. 2d at 955. In the present case, Pet never dropped the price for any of its pies sharply in the Intermountain Market, although its prices for the Pet-Ritz pie declined gradually as general price levels for the pies declined.

In some of the "predatory" pricing cases, the discriminatory price went well below the price of the local producer. 142 F. 2d at 513; 269 F. 2d at 956. In the present case, Pet's price never went below, never met, and seldom came within range of the prices at which Utah Pie was selling its Utah and Frost 'N' Flame brands.

In the "predatory" pricing cases, the local producer either was driven out of business or suffered severe losses in trade. 30 F. 2d at 236-237; 243 F. 2d at 718; 269 F. 2d at 956. In the present case, Utah Pie gained in sales volume and the company's earnings increased.

B. QUESTIONS ASSIGNED BY THE COURT

In granting certiorari, this Court asked that three questions be briefed and discussed in oral argument. The questions, with the third brought into first place, are as follows:

1. "Whether Rule 50(d) of the Federal Rules of Civil Procedure provides the Court of Appeals with any authority to direct the entry of judgment for respondents?"

2. "Whether, if this Court affirms the judgment and order of the Court of Appeals directing the District Court to enter judgment for respondents, petitioner can then make a motion for new trial under Rule 50(c)(2) of the Federal Rules of Civil Procedure within 10 days of the District Court's entry of judgment for respondents?"

3. "Whether, if under the order of the Court of Appeals, petitioner cannot make a motion for new trial under Rule 50(c)(2) within 10 days of the District Court's entry of judgment against him, the order of the Court of Appeals directing the District Court to enter judgment for respondents is compatible with Rule 50(b) as interpreted by this Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212; *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571; and *Weade* v. *Dichmann, Wright & Pugh*, 337 U.S. 801?"

These questions put at issue the basic authority of the appellate courts to direct the entry of a judgment, notwithstanding a jury verdict, for insufficiency of evidence. The questions and their application to this case are discussed below. Also discussed are the purposes and functions served by a motion for new trial.

1. Does Rule 50(d) of the Federal Rules of Civil Procedure Provide the Court of Appeals With Any Authority to Direct the Entry of Judgment for Respondents?

a. Source of Appellate Court's Authority to Direct Entry of Judgment n.o.v.

Neither Rule 50(d) nor any other of the Federal Rules of Civil Procedure has any bearing on the authority of an appellate court to direct a trial court to enter judgment, notwithstanding the verdict of a jury, on the ground that the evidence was insufficient to support the jury's verdict. Federal appellate courts have such authority. The authority is derived from common law and from Section 2106 of the Judicial Code of the United States. 28 U.S.C. § 2106. The section is as follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

The section is derived directly from Section 24 of the Judiciary Act of 1789 (Act of Sept. 24, 1789; c. 20, § 24; 1 Stat. 85), which was as follows:

> "Sec. 24. *And be it further enacted,* That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except where the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. . . ."

b. Procedures Prior to Adoption of Federal Rules of Civil Procedure.

Under Section 2106 of the Judicial Code and under procedures developed at common law, this Court, the circuit courts, when they acted as appellate courts, and the courts of appeals, after they were created in 1891 (Act of March 3, 1891; 26 Stat. 826) have repeatedly directed entry of judgment n.o.v., when the evidence would not sustain a jury's verdict,[11] although some confusion arose on the possible conflict between that practice and the Seventh Amendment to the Constitution of the United States. That amendment provides in part that "no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

This Court was asked to resolve the confusion in *Slocum* v. *New York L. Ins. Co.*, 228 U.S. 364 (1913). The questions in *Slocum* were whether or not an appellate court reexamined a "fact tried by jury" in assessing the sufficieney of the evidence, and directing entry of judgment n.o.v.; and whether the direction of entry of such judgment was "according to the rules of common law." The majority in *Slocum* appeared to hold that an appellate court did "reexamine evidence" in such a situation; and that, because of the Seventh Amendment, an appellate court could not direct entry of judgment n.o.v., when it concluded that the evidence would not sustain the verdict. *Id.*, at 399.

The *Slocum* holding was expressly limited, however, in *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, 661 (1935), an opinion written by the same justice, Mr.

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[11] See Mr. Justice Hughes's review of procedures prior to 1913 in his dissenting opinion in *Slocum* v. *New York L. Ins. Co.*, 228 U.S. 364, 400 (1913).

Justice Van Devanter, who had written the majority opinion in *Slocum*. In *Redman*, a personal injury case, the defendant moved at the close of the evidence for a dismissal of the complaint and for a directed verdict. Both motions were based on the ground that the evidence was insufficient to support a verdict for the plaintiff. The trial court reserved its decision on both motions, and submitted the case to the jury, subject to a ruling on the motions. After verdict, the court denied the motions and entered judgment on the verdict for the plaintiff. *Id.*, at 656.

In the court of appeals, the defendant urged that the court direct a dismissal of the complaint. *Redman* v. *Baltimore & Carolina Line*, 70 F.2d 635, 636 (2d Cir. 1934). The court of appeals found the evidence insufficient to support the verdict, and reversed the judgment; but it refused to direct dismissal of the complaint. Under the *Slocum* decision, the court said, when it reversed the trial court on the sufficiency of the evidence, it could only direct a new trial. *Id.*, at 638. The Supreme Court reversed the court of appeals on the question of the appellate court's authority to dismiss a complaint or direct entry of judgment n.o.v. The Court commented as follows on the Seventh Amendment, common law practice, and its *Slocum* opinion:

> "The aim of the [Seventh] Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are

to be determined by the jury under appropriate instructions by the court. [Cf. dissenting opinion of Mr. Justice Hughes in *Slocum,* 228 U.S., at 408.]

"In *Slocum* v. *New York Life Insurance Co.* . . . the question presented to us was whether, in the situation disclosed, the direction [by a court of appeals] for a judgment for the defendant was an infraction of the Seventh Amendment. We held it was and that the direction should be for a new trial.

"It therefore is important to have in mind the the situation to which our ruling applied. In that case the defendant's request for a directed verdict was denied without any reservation of the question of the sufficiency of the evidence or of any other matter; and the verdict for the plaintiff was taken unconditionally, and not subject to the court's opinion on the sufficiency of the evidence . . . ." 295 U.S., at 657-658.

In other words, in the *Slocum* case the defect was not in the authority of the appellate court, but in the procedures followed by the party who had lost the jury's verdict. Turning to the procedures followed in *Redman,* the Court commented as follows:

"A very different situation is disclosed in the present case. The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Whether the evidence was sufficient or otherwise was a question of law to be resolved by the court. The verdict for the plaintiff was taken pending the court's rulings on the motions and subject to those rulings.

* * *

"At common law there was a well established practice of reserving questions of law arising dur-

> ing trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as non-suiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict to the other, or making other essential adjustments." *Id.*, at 658-659.

That this "authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation . . . entering a verdict of judgment for one party where the jury had given a verdict to the other" was vested in an appellate, as well as in a trial court, is made clear by the fact that the Supreme Court directed the court of appeals to modify its judgment "by substituting a direction for a judgment of dismissal on the merits in place of the direction for a new trial . . . ." *Id.*, at 661.

So the matter stood in 1935 when this Court was authorized to adopt rules of procedure for federal district courts in civil actions. Act of June 19, 1934, c. 651; 48 Stat. 1064; 28 U.S.C. § 2072. Three years later, on September 16, 1938, the Federal Rules of Civil Procedure, adopted by this Court, went into effect. During these three years, when an appellate court was asked to direct entry of judgment n.o.v. in favor of the verdict-loser the only questions were (1) whether or not motions for a directed verdict and for dismissal of a complaint or for judgment notwithstanding a verdict had been timely made, and (2) whether or not the trial judge had reserved his decision on the motion for directed verdict or for dismissal, pending the return of the jury's verdict.

In *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389 (1937), for example, the plaintiff, who had lost the jury's verdict, had moved for a directed verdict at the close of the evidence. The motion was immediately denied and the case went to the jury. After verdict for the defendant, plaintiff moved for a new trial, but did not move for judgment notwithstanding the verdict. The motion for a new trial was denied. On the plaintiff's appeal, the court of appeals held that the evidence did not support the verdict the jury had returned in the defendant's favor. In reliance on the *Redman* opinion, the court of appeals directed the trial court to enter judgment in favor of the plaintiff. *Kennedy* v. *Aetna Ins. Co.,* 87 F. 2d 683, 686-687 (3d Cir. 1937).

The Supreme Court, however, ruled that *Redman* was not applicable, because the trial judge had not reserved any question of law to be decided after the verdict was received. In addition, the plaintiff had not moved for judgment n.o.v. in the trial court, as required by Pennsylvania law if a trial court was to enter such judgment. 301 U.S., at 394-395.

c. Adoption of Federal Rules of Civil Procedure.

Before the effective date of the Federal Rules of Civil Procedure the procedural rules for civil actions brought in a federal district court were, under the Conformity Act (Act of June 1, 1872, c. CCLV, § 4; 17 Stat. 197), the rules for courts of record in the state in which the federal court was located. The Federal Rules replaced this practice, and established uniform procedural rules for the federal district courts wherever located. Rule 50(b) was included in the original Rules of Civil Procedure, as adopted by this Court. The reasons for the inclusion of the rule were first

stated by this Court in 1940 in *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250 (1940). The reasons were again summarized by Mr. Justice Black in *Johnson* v. *New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), as follows:

> "The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250. It was adopted following confusion in this field brought about in part by three cases decided by this Court, *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364; *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654; and *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389. The *Slocum* case was understood to hold that the Seventh Amendment forbade United States courts to enter judgments in favor of one party after jury verdict in favor of the other. The *Redman* case tried in New York held that the Seventh Amendment did not forbid entry of judgment notwithstanding a verdict where, prior to the verdict, the trial judge, following New York procedure, had expressly reserved his decision on a motion for a directed verdict. The New York District Court was authorized to follow this state practice because of the Conformity Act, R. S. (1878) § 914. Thus the *Redman* case did not purport to adopt New York procedure for the general guidance of federal courts. Later the *Kennedy* case cast doubt on the *Redman* holding, at least as to its scope. In the *Kennedy* case plaintiff's request for directed verdict had not been followed by a timely motion for judgment notwithstanding the verdict as required by Pennsylvania law. Failure to conform to this Pennsylvania practice was a reason given by this Court for finding lack of power in the District Court to enter judgment contrary to the verdict.

"Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the *Redman* and *Kennedy* cases. Federal courts were to be guided by this new rule, which provided its own exclusive procedural program. It rejected the New York procedure applied in the *Redman* case, which permitted judgment to be set aside even though no motion to do so had been filed after verdict. Instead it approached more closely the Pennsylvania rule, relied on in the *Kennedy* case, under which judgments contrary to verdicts would not be awarded in the absence of specific timely motions for them. But Rule 50(b) departed from the New York and Pennsylvania procedures by making it wholly unnecessary for a judge to make an express reservation of his decision on a motion for directed verdict. The rule itself made the reservation automatic. A court is always 'deemed to have submitted the action to the jury subject to a later determination' of the right to a directed verdict if a motion for judgment notwithstanding the verdict is made 'within 10 days after the reception of a verdict . . . .' This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. See *Cone* v. *West Virginia Pulp & Paper Co., supra,* [330 U.S.] at 217-218." 344 U.S., at 51-53. (Footnote omitted.)

In the *Johnson* case, the defendant had moved for a directed verdict after all evidence was in, and a deci-

sion on the motion was reserved by the judge. Verdict was for the plaintiff. Within 10 days, defendant moved to have the verdict set aside, but defendant did not move in so many words "to have judgment entered in accordance with his motion for a directed verdict." 344 U.S., at 50. The court of appeals (194 F.2d 194 (2d Cir. 1952)) held that the evidence did not sustain the verdict, and directed the trial court to enter judgment in the defendant's favor, notwithstanding the jury verdict. The Supreme Court held that the court of appeals had no authority to direct entry of judgment, since the procedures prescribed by Rule 50(b) had not been followed in the trial court. Four justices contended that the procedures had been followed in substance, if not in the exact language of the rule. 344 U.S., at 55.

So it is with other cases in which the Supreme Court has considered the authority of a court of appeals to direct a trial court to enter judgment notwithstanding a jury verdict. *The question has not been whether or not a court of appeals has such authority. That question was settled by the opinion in the Redman case. The question has been whether a court of appeals has such authority when the procedure prescribed by Rule 50(b) has not been followed by the party losing the jury's verdict in the trial court.* See *Berry* v. *United States,* 312 U.S. 450 (1941); *Conway* v. *O'Brien,* 312 U.S. 492 (1941); and *Halliday* v. *United States,* 315 U.S. 94 (1942).

In each of these cases, the party losing the jury verdict had failed to renew its motion for judgment in accordance with its motion for a directed verdict. In each case a court of appeals found that the evidence would not sustain the jury's verdict, and had directed

entry of judgment n.o.v. for the loser. The question before the Supreme Court was whether the court of appeals could direct entry of judgment when the post-verdict motion called for by Rule 50(b) had not been made. In each case the Court found that the evidence could sustain the verdict, and did not reach the question under Rule 50(b). 312 U.S., at 452 and 493; 315 U.S., at 96. The question was reached and decided in the *Johnson* case. Under *Johnson* when the motions required by Rule 50(b) have not been made in the trial court, neither the trial judge nor the appellate court may enter judgment n.o.v. 344 U.S., at 50. Under *Redman* when the required motions have been made, either the trial judge may enter or an appellate court may direct entry of judgment n.o.v. for insufficiency of the evidence. Entry of such judgment was specifically ordered by this Court in *New York, New Haven & Hartford Railroad Co.* v. *Henagan,* 364 U.S. 441 (1960) because of the insufficiency of the evidence.

The *Slocum* and *Redman* opinions and the history of Rule 50(b) have been discussed at this length to remind the Court that an appellate court has long had the authority to direct entry of judgment n.o.v. for insufficiency of the evidence; and to review the problem Rule 50(b) was to solve. There remains the question as to whether or not Rule 50(d) has changed the authority of the appellate courts to direct entry of judgment n.o.v.

d. Effect of Federal Rules, Particularly 50(d), on Authority of Appellate Courts.

The short answer to the question just posed is that Rule 50(d) has not changed and could not change the authority of appellate courts, either to enlarge or to diminish it. The authority of the appellate courts, in-

cluding this court, to direct entry of judgment n.o.v. was not created for or vested in the courts by the Federal Rules. The authority existed at common law, as discussed in the *Redman* opinion, 295 U.S., at 659-660; and was codified by the Judiciary Act of 1789. Act of Sept. 24, 1789, c. 20, § 24; 1 Stat. 85. The authority has been affirmed each time the Congress has re-enacted the Judicial Code, most recently in 1948. Act of June 25, 1948, c. 646; 62 Stat. 963.

Through the Federal Rules this Court has authority only "to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions." Act of June 19, 1934, c. 651; 48 Stat. 1064; 28 U.S.C. § 2072. The Rules themselves recognize that they are limited to procedural matters and cannot be used to change the jurisdiction of the federal courts. Rule 82 expressly provides that the "rules shall not be construed to extend or limit the jurisdiction of the United States District Courts or the venue of actions therein." Certainly, then, the jurisdiction of the appellate courts cannot be changed by the Rules, and the word jurisdiction includes the authority of a court to enter appropriate orders in a given case.

Apart from Rule 82 and before the Enabling Act of 1934 was passed, the Supreme Court recognized that rules of procedure cannot "enlarge or restrict" the jurisdiction of a court. In *Washington-Southern Nav. Co.* v. *Baltimore & P. S.B. Co.*, 263 U.S. 629, 635-636 (1924), the Court said:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other

things, the regulation of the forms, operation, and effect of process; and the prescribing of forms, modes, and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity, or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred." (Footnote omitted.)

This principle was affirmed by the Court after the Federal Rules of Civil Procedure became effective. In *United States* v. *Sherwood,* 312 U.S. 584, 589-590 (1941), the Court said:

> "An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction; and the Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C. § 723b, authorizing this Court to prescribe rules of procedure in civil actions gave it no authority to modify, abridge or enlarge the substantive rights of litigants or to enlarge or diminish the jurisdiction of federal courts."

Rule 50(d) cannot therefore affect the authority of the courts of appeals to direct entry of judgment notwithstanding a jury's verdict.

Rule 50(d) must be read in conjunction with Rule 50(c); and both subsections, added to the Rules in 1963, must be construed with reference to the proce-

dural problem they were to solve. This problem is discussed below, in connection with the question the Court has asked concerning Rule 50(c).

Rule 50(d) comes into play when the motion for judgment notwithstanding the verdict, made by the loser of the jury's verdict, is denied. The rule puts "the party who prevailed on that motion," the party who has won the jury's verdict, on notice that, if he desires a new trial, he should as appellee and in the appellate court "assert grounds entitling him to a new trial." The rule is a reminder to the verdict-winner that he should assert any grounds he may have for a new trial, before the appellate court acts. This is no burden, for any verdict-winner, especially one represented by skilled counsel, is on notice that his verdict may be set aside when insufficiency of evidence is a point relied upon on appeal.

The subsection's function was stated by the Advisory Committee's 1963 Note as follows:

> "*Subdivision (d)* deals with the situation where judgment has been entered on the jury verdict, the motion for judgment n.o.v. and any motion for a new trial having been denied by the trial court. The verdict-winner, as appellee, besides seeking to uphold the judgment, may urge upon the appellate court that in case the trial court is found to have erred in entering judgment on the verdict, there are grounds for granting him a new trial instead of directing the entry of judgment for his opponent. In appropriate cases the appellate court is not precluded from itself directing that a new trial be had. See *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801 (1949). Nor is it precluded in proper cases from remanding the case for a determination by the trial court as to whether a new trial should be granted. The latter course

is advisable where the grounds urged are suitable for the exercise of trial court discretion." Advisory Committee's Note of 1963 to Subdivision (d), Moore's Federal Practice Rules Pamphlet, p. 875 (1966).

The rule does not in any way require the appellate court either itself to direct a new trial or to remand a case for determination by the trial court on the propriety of a new trial. *Indeed a direction by an appellate court that a new trial be had, which 50(d) permits and which appellate courts have frequently done in the past, would seem to deprive the trial court of its discretion in the matter as effectively as would the direction that judgment n.o.v. be entered.*

Rule 50(d) does not expressly or by implication deprive a court of appeals of authority to direct entry of judgment n.o.v. for insufficiency of evidence to support a jury's verdict. For reasons given above, neither this rule nor any other procedural rule can deprive appellate courts of that authority.

To answer the Court's question directly, a court of appeals has authority, not under Rule 50(d) but otherwise, under common law and under 28 U.S.C. § 2106, to direct entry of judgment notwithstanding the verdict of a jury, on the ground that the evidence was insufficient to support the jury's verdict.

2. If the Court Affirms the Judgment and Order of the Court of Appeals Directing the District Court To Enter Judgment for Respondents, Can Petitioner Then Make a Motion for New Trial Under Rule 50(c)(2) of the Federal Rules of Civil Procedure Within 10 Days of the District Court's Entry of Judgment for Respondents?

a. Function of Rule 50(c).

Rule 50(c) was added to Rule 50 by amendments to the Federal Rules effective July 1, 1963. It dealt with the situation that had been before the Supreme Court in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243 (1940), where confusion arose over whether the granting by the trial court of a motion for judgment n.o.v. was an automatic denial of the moving party's alternative motion for a new trial.

In the *Montgomery Ward* case, after verdict, the verdict-loser had moved in the alternative for judgment in accordance with its motion for a directed verdict, or for a new trial. The trial judge granted the motion for judgment n.o.v., but did not rule on the motion for a new trial. 311 U.S., at 246.

The court of appeals reversed the trial court's granting of the judgment n.o.v. and rejected the contention by Montgomery Ward that the cause should be remanded for the trial court to dispose of the motion for a new trial. "The order sustaining the motion for judgment notwithstanding the verdict was equivalent to a denial of the motion for a new trial," the court of appeals said. 108 F.2d 848, 853 (1940).

This Court reversed and, following "the first state statute to authorize such procedure," held that the cause should go back "to the District Court to hear and rule upon" the motion for a new trial. 311 U.S., at 255.

The result Rule 50 (c) was to accomplish is stated by the Advisory Committee as follows:

> "*Subdivision (c)* deals with the situation where a party joins a motion for a new trial with his motion for judgment n.o.v., or prays for a new trial in the alternative, *and the motion for judgment n.o.v. is granted.* The procedure to be followed in making rulings on the motion for the new trial, and the consequences of the rulings thereon, were partly set out in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243, 253 (1940), and have been further elaborated in later cases. See *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U.S. 212 (1947); *Globe Liquor Co., Inc.* v. *San Roman,* 332 U.S. 571 (1948); *Fountain* v. *Filson,* 336 U.S. 681 (1949); *Johnson* v. *New York, N.H. & H. R.R. Co.,* 344 U.S. 48 (1952). However, courts as well as counsel have often misunderstood the procedure, and it will be helpful to summarize the proper practice in the text of the rule. *The amendments do not alter the effects of a jury verdict or the scope of appellate review.*
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> * * *
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> "*Subdivision (c)(2),* which also deals with the situation where the trial court has granted the motion for judgment n.o.v., states that the verdict-winner may apply to the trial court for a new trial pursuant to Rule 59 after the judgment n.o.v. has been entered against him. In arguing to the trial court in opposition to the motion for judgment n.o.v., the verdict-winner may, and often will, contend that he is entitled, at the least, to a new trial, and the court has a range of discretion to grant a new trial or (where plaintiff won the verdict) to order a dismissal of the action without prejudice instead of granting judgment n.o.v. See *Cone* v. *West Virginia Pulp & Paper Co., supra,* 330 U.S. at 217, 218. Subdivision (c)(2) is a reminder that the verdict-winner is entitled, even

after entry of judgment n.o.v. against him, to move for a new trial in the usual course. If in these circumstances the motion is granted, the judgment is superseded.

* * *

"Even if the verdict-winner makes no motion for a new trial, he is entitled upon his appeal from the judgment n.o.v. not only to urge that that judgment should be reversed and judgment entered upon the verdict, but that errors were committed during the trial which at the least entitle him to a new trial." Advisory Committee's Note of 1963 to Subdivision (c), Moore's Federal Practice Rules Pamphlet, pp. 871-873 (1966). (Emphasis supplied.)

Thus, it is clear that no part of subsection (c) comes into play unles the trial court has granted a motion for judgment n.o.v. To construe subsection (c)(2) as permitting a party whose verdict has been set aside by direction of an appellate court to move for a new trial within 10 days after the trial court's entry of the judgment n.o.v. would disregard the plain language of the subsection; it would also affect the scope of appellate review, which was not intended;[12] and it would drastically alter the function a "new trial" is to serve and the relation between trial and appellate courts after an appeal is taken.

b. Function of a New Trial.

The purpose a motion for a new trial is to serve is stated by Mr. Justice Black in *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212 (1947). The motion, Mr.

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[12] "The amendments [to Rule 50(c)] do not alter the effects of a jury verdict or the scope of appellate review." Advisory Committee's Note of 1963 to Subdivision (c), Moore's Federal Practice Rules Pamphlet, p. 871 (1966).

Justice Black said, "presents the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.'" *Id.*, at 216. In accord: *Jones* v. *Thompson*, 128 F.2d 888, 889 (8th Cir. 1942).

A classic and oft-cited expression of the purpose of such a motion appears in *Aetna Casualty & Surety Co.* v. *Yeatts*, 122 F.2d 350 (4th Cir. 1941), where Judge Parker said:

> "The motion to set aside the verdict and grant a new trial was a matter of federal procedure, governed by Rule of Civil Procedure 59 and not subject in any way to the rules of state practice. On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right. Smith v. Times Pub. Co., 178 Pa. 481, 36 A. 296, 35 L.R.A. 819; Bright v. Eynon 1 Burr. 390; Mellin v. Taylor 3 B.N.C. 109, 132 Eng. Reports 351. The matter was well put by Mr. Justice Mitchell, speaking for the Supreme Court of Pennsylvania in Smith v. Times Publishing Co., supra [178 Pa. 481, 36 A. 298], as follows: 'The authority of the common pleas in the control and revision of excessive verdicts through the means of new trials was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions. It is a power to

> examine the whole case on the law and the evidence, with a view to securing a result, not merely legal, but also not manifestly against justice,—a power exercised in pursuance of a sound judicial discretion, *without which the jury system would be a capricious and intolerable tyranny, which* no people could long endure. This court has had occasion more than once recently to to [sic] say that it was *a power the courts ought to exercise unflinchingly.'* (Italics supplied)." 122 F.2d, at 352-353.

The motion for a new trial is addressed to the trial court *before appeal.* It is a means of allowing a trial court to correct its own errors, and of avoiding appeal. In some jurisdictions, a motion for a new trial is one means of preserving errors for appellate review. See, e.g., *State* v. *Northup,* 367 S.W. 2d 512, 514 (Mo. 1963). The motion should be made shortly after the trial, while the proceedings are still fresh in the trial judge's mind. Under common-law practice, such a motion had to be made within four days of entry of a rule for judgment, and could not be made after the term of the court had expired, though the latter rule might be varied by statute. *Sanderson* v. *United States,* 210 U.S. 168, 175 (1908); *Belknap* v. *United States,* 150 U.S. 588, 591 (1893); and *Cambuston* v. *United States,* 95 U.S. 285, 287-288 (1877).

If no motion for new trial is made within the time allowed, or a motion is made and denied, an appeal transfers jurisdiction of the cause to the appellate court. See *The Midland Terminal Ry. Co.* v. *Warinner,* 294 Fed. 185, 188 (8th Cir. 1923); *Tinkoff* v. *United States,* 86 F.2d 868, 874 (7th Cir. 1937).

After appeal, the trial court cannot entertain a motion for a new trial without the permission of the appel-

late court. See *John Simmons Co.* v. *Grier Brothers Co.*, 258 U.S. 82, 91 (1922); *City of Orlando* v. *Murphy*, 94 F.2d 426, 429 (1938); and *Flowers* v. *United States*, 86 F.2d 79, 80-81 (8th Cir. 1936).

The principles were well-stated in the *City of Orlando* opinion as follows:

> "The rules governing procedure in a federal trial court after reversal are well settled. Where the merits of a case have been once decided on appeal, the trial court has no authority, without express leave of the appellate court, to grant a new trial and re-hearing, of a review, or to permit new defenses, on the merits to be introduced by amendment. Thus, if a case is affirmed on appeal, there is res adjudicata, and no power exists after the term to alter the decision. *The same is true where, on reversal, a mandate is issued requiring the entry of a specific judgment. . . .*" 94 F.2d, at 429. (Emphasis supplied.)

This Court recognized the principle in *Federal Comm'n* v. *Broadcasting Co.*, 309 U.S. 134, 140 (1940), when it said:

> "The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See *In Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56. That proposition is indisputable. . . ."

Since an appeal takes a cause out of the jurisdiction of a trial court, except subsequently to execute the mandate of the appellate court, and since the Supreme Court has no authority in adopting Federal Rules of Civil Procedure to change the jurisdiction of the federal courts (see pages 113–114, *supra*), Rule

50 (c)(2) does not give a trial court jurisdiction to consider a motion for a new trial within 10 days after entry of judgment n.o.v. when the judgment is entered at the direction of an appellate court.

These principles are in accord with common sense. The functions of a motion for a new trial are to give the trial judge "'a last chance to correct his own errors without the delay, expense or other hardships of an appeal'" (330 U.S., at 216); and to permit the trial judge "with fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses," to decide whether he has made errors that need to be corrected. *Ibid.*

After an appeal has been taken, the trial judge's errors have been corrected; the "delay, expense or other hardships" have been incurred; and the trial judge's "fresh personal knowledge" has faded. If, after the lapse of time necessitated by an appeal, a trial judge is to rule fairly on a motion for a new trial, he would have to review the printed transcript. That judge may not even be on the bench to hear and rule on such a motion; and a new judge would certainly have to review the transcript to rule on such a motion. Neither the judge who conducted the trial nor a new trial judge would be in a better position than the appellate court to decide from the transcript whether a new trial is necessary.

3. If, Under the Order of the Court of Appeals, Petitioner Cannot Make a Motion for New Trial Under Rule 50(c)(2) Within 10 Days of the District Court's Entry of Judgment Against Him, Is the Order of the Court of Appeals Directing the District Court to Enter Judgment for Respondents Compatible With Rule 50(b) as Interpreted by This Court in Its Cone, Globe, and Weade Opinions?

a. View Expressed in Cone and Globe Would Limit Appellate Court's Authority.

Language in this Court's opinions in *Cone* v. *West Virginia Paper Co.*, 330 U.S. 212 (1947) and *Globe Liquor Co.* v. *San Roman*, 332 U.S. 571 (1948) indicates a belief that the winner of a jury verdict must always be able to move in the trial court for a new trial, before judgment notwithstanding the verdict may be entered against him at the direction of an appellate court. In *Cone*, the Court, speaking through Mr. Justice Black, said:

> "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418, 132 A. 355, 357; *Bunn* v. *Furstein*, 153 Pa. Super. 637, 638, 34 A. 2d 924. See also *Yutterman* v. *Sternberg*, 86 F. 2d 321, 324. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.' See *Greer* v. *Carpenter*, 323 Mo. 878, 882, 19 S.W. 2d 1046, 1047. *Cf. United States* v. *Johnson*, 327 U.S. 106, 112." 330 U.S., at 216.

Like views are expressed in the *Globe* opinion, 332 U.S., at 573-574.

In effect, the views expressed in the *Cone* and *Globe* opinions would permit an appellate court to direct a new trial or direct the trial court to rule on a motion for a new trial, when the appellate court finds, as a matter of law, that the evidence introduced in the trial court was insufficient to support a jury's verdict; *but* the appellate court *could never* direct entry of judgment notwithstanding the verdict. This is not the holding in *Cone, Globe* or *Weade (Weade* v. *Dichmann Co.,* 337 U.S. 801 (1949)) It is not the rule at common law; and it is contrary to the procedures stated by this Court in *Johnson* v. *New York, N. H. & H. R. Co., supra,* pp. 109-111, and *Baltimore & C. Line* v. *Redman, supra,* pp. 104-107. See also *New York, New Haven & Hartford Railroad Co.* v. *Henagan,* 364 U.S. 441 (1960).

b. Rule 50(b) and the Cone and Globe Opinions.

The *Cone* and *Globe* cases illustrate the consequences of the failure of the verdict-loser to comply with the requirements of Rule 50(b).

No one would seriously question that the Federal Rules of Civil Procedure can and do place procedural restrictions or conditions precedent to the exercise by the appellate courts of the powers granted under Section 2106 of the Judicial Code of United States. If a party does not observe the requirements of the Rules he does so at his peril.[13] In the *Cone* and *Globe*

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[13] Examples other than Rule 50 are Rule 51 where a party fails to object to the giving of an instruction to the jury and Rule 59(b) where a timely motion for a new trial is not filed.

cases the failure of the verdict-loser to file the proper motions acted as a limitation on the powers of the appellate courts to direct the entry of final judgment under Section 2106.

This is not an unreasonable limitation because absent such motions the trial judge has had no opportunity "after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone." He has not had " 'a last chance to correct his own errors without the delay, expense or other hardships of an appeal.' " 330 U.S., at 216. Here, Pet as the verdict-loser in the trial court complied fully with the requirements of Rule 50(b). (R. 54-55) The trial judge was given full opportunity to correct any errors. He saw none, and denied the motions. (R. 58)

Thus, the Pet Milk Company is procedurally in the position of the verdict-loser described by this Court in *Montgomery Ward & Co.* v. *Duncan,* 311 U.S. 243 (1940), as follows:

> "If alternative prayers or motions are presented, as here, we hold that the trial judge should rule on the motion for judgment. Whatever his ruling thereon he should also rule on the motion for a new trial, indicating the grounds of his decision. If he denies a judgment *n.o.v.* and also denies a new trial the judgment on the verdict stands, and the losing party may appeal from the judgment entered upon it, assigning as error both the refusal of judgment *n.o.v.* and errors of law in the trial, as heretofore. The appellate court may reverse the former action and itself enter judgment *n.o.v.* or it may reverse and remand for a new trial for errors of law. . . ." 311 U.S., at 253-254. (Footnote omitted.)

c. Situation in Weade Differed From That in Cone and Globe.

Weade v. *Dichmann Co.*, 337 U.S. 801 (1949), involved a situation different from that posed in *Cone* and *Globe*. The plaintiffs' case had been tried on an erroneous theory, and they had received judgment pursuant to a jury verdict. On appeal the court of appeals had reversed and directed the trial court to enter judgment for the defendant. This Court, while otherwise agreeing with the appellate court, eliminated the direction to enter judgment because "there were suggestions in the complaint and evidence of alleged liability of respondent to petitioners for respondent's own negligence while acting as general agent . . . ." [337 U.S., at 809] The case thus stands for the proposition that where a plaintiff tries his case on the wrong theory of liability, he should be given an opportunity by the appellate court to try his case on a right theory if the evidence and pleadings disclose or suggest the alternative. With this the Pet Milk Company has no quarrel; but the principle of the *Weade* case has no application to it.

To answer the Court's question specifically, there is, *under the posture of this case,* nothing incompatible between the court of appeals' order that judgment n.o.v. be entered and this Court's interpretation of Rule 50(b) in the *Cone, Globe* and *Weade* opinions. The Pet Milk Company fully complied with the requirements of Rule 50(b), which satisfies *Cone* and *Globe*. The court of appeals disregarded *no* evidence of Utah Pie directed against Pet. There is no suggestion anywhere of an alternative theory of liability. In fact, Utah Pie has expressly admitted that *no* "evidence which should have been admitted has been erroneously excluded from the evidence in the trial court." (Brief 136) Therefore, the situation that

faced this Court in *Weade* does not exist here as to the Pet Milk Company.

Justice requires that both parties have an opportunity to move for a new trial, but it does not require that the opportunity be kept open indefinitely. The winner of a jury verdict in a trial court is aware that the verdict may be set aside by a court of appeals for insufficiency of the evidence, when the verdict-loser has moved for judgment n.o.v., in compliance with Rule 50(b) in the trial court. The verdict-winner may move for a new trial in the trial court when he opposes the loser's motion for judgment n.o.v. See the Advisory Committee's Note of 1963 to subdivision (c), *supra*, p. 118.

If no motion is made in the trial court, the verdict-winner is reminded by Rule 50(d) that he has a second opportunity to assert grounds for a new trial in the appellate court when, as appellee, he is opposing any reversal of the trial court's refusal to grant judgment n.o.v. See Advisory Committee's Note of 1963 to subdivision (d), *supra*, p. 115. If these opportunities are passed over, neither justice nor the Seventh Amendment requires that a third opportunity be provided for the verdict-winner to move in the trial court for a new trial—possibly years after the original trial, when the evidence and witnesses are no longer fresh in the mind of the judge who tried the case, and indeed that judge may no longer be on the bench.

d. Utah Pie's Contention That Court of Appeals "Removed" Denver Evidence.

In this Court Utah Pie claims it was surprised by the action of the court of appeals in "removing" some of its evidence, thereby creating a "'hole' . . . not visible to Utah Pie, the trial court or the jury."

(Brief 135) For this reason Utah Pie insists it is entitled to a new trial or at least to the right to move for one. (Brief 137) It is thus fundamentally important to determine what the controversial evidence was and at whom it was directed.

The so-called "hole" in plaintiff's evidence stems from the following holding of the court of appeals:

> "With respect to Utah Pie's belated contention that the verdict against Continental can be supported by evidence of price discrimination violations in the Denver market area, little need be said. It is a departure from the theory on which Utah Pie, by its requested instructions, asked the court to submit its claim to the jury. It is a theory clearly not submitted to the jury by the court in its charge, nor passed on by the jury. The Denver market area was never mentioned and the Salt Lake City market was frequently referred to in the charge. The verdict returned was in a form submitted to the court by Utah Pie, and by its express language showed it was based solely on a price discrimination in the Salt Lake City market. For the reasons stated, such contention is clearly untenable." (R. 1504-1505.) (Footnote omitted.)

This is the "Denver evidence" which Utah Pie complains was erroneously excluded. (Brief 122-128)

The portion of the opinion of the court of appeals quoted above is concerned with Continental and not the Pet Milk Company. This is borne out by reference to Utah Pie's petition for a writ of certiorari and to its Brief in this Court. In the former, under questions presented, question 12 reads:

> "12. Could the Court of Appeals properly disregard the evidence of respondent Continental's Denver price discriminations, on the grounds that

the district court's charge did not submit that issue to the jury, and then order entry of judgment in favor of Continental without a new trial?" Petition 5.

This is reiterated in its statement (Petition 19-20), and under its reasons for granting the writ, reason 9 states:

"9. If Continental's Denver Discriminations Were Not Before the Jury, There Should be a New Trial, Not Judgment for Continental." Petition 50.

The citation to the *Weade* case (Petition 51) in support of this position makes it obvious that Utah Pie is contending that the "Denver evidence" should go to the jury in a new trial *against Continental.* Nowhere was it alleged that the *Weade* principle had any application to the Pet Milk Company.

This becomes even more apparent from Utah Pie's brief in this Court. At page 50 thereof it is unequivocally stated:

"Except for Utah Pie's claim against Pet for loss of Safeway Bel Air business in the Denver Division of Safeway (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 99; R. 584, 4602) Utah Pie's *entire* Denver claim was against Continental (Pl. Ex. 95; R. 574, 4591; Pl. Ex. 98; R. 583, 4600)."

Again at page 64, in itemizing the alleged errors of the court of appeals, Utah Pie maintains:

"—It expressly excluded from its consideration Continental's discriminations in Denver, although the whole course of the trial, the evidence and the argument clearly showed that Denver was at all times part of Utah Pie's case against Continental."

And finally, with respect to the state of the evidence, Utah Pie concludes:

> "Here, Utah Pie *does not claim that any evidence which should have been admitted has been erroneously excluded from the evidence in the trial court.* It did not, and could hardly have been expected to, anticipate that the Court of Appeals would 'exclude' evidence which it had offered, argued, and (as it believed) submitted to the jury." (Emphasis supplied; Brief 136-137)

Thus, the "hole" in the evidence relates to Utah Pie's claim against Continental and Continental alone.

As to the Pet Milk Company, there was no exclusion of any Denver evidence against it. The alleged loss "of Safeway Bel Air business in the Denver Division of Safeway" charged to Pet went to the jury, and presumably was considered by it. The court of appeals analyzed the Safeway evidence, and found the evidence insufficient to support Utah's claims against Pet based on the evidence. The court removed no evidence as to Pet which Utah Pie "had offered, argued, and (as it believed) submitted to the jury." (Brief 137)

The references to the Pet Milk Company in the portion of Utah Pie's brief entitled, "b. Denver Was in Issue Throughout the Trial" (Brief 122-124) are misleading. The quotation on page 123 from the argument of Utah's counsel to the jury shows clearly that the Denver evidence against Pet *went to the jury.* This is consistent with the statement on page 50 of the brief, quoted above. Page 130, *supra.*

There is thus no justification for the statement:

> "Utah Pie respectfully submits that the Court of Appeals has erred in excluding the Denver evi-

dence from its consideration in finding Utah Pie's evidence insufficient to support the *verdicts.*" Emphasis supplied; Brief 126-127.

Whether the "excluded" Denver evidence is sufficient to support the verdict against Continental is not for the Pet Milk Company to say. But since this evidence was not directed against Pet it cannot now be urged as supporting the Pet verdict.

c. Pet's Position in the Present Case.

Procedurally, this case insofar as it concerns the Pet Milk Company is in the following posture:

1. Pet, while the case was in the trial court, filed all requisite motions under Rule 50(b). Therefore the conditions precedent to the court of appeals' exercise of its powers under Section 2106 of the United States Judicial Code were satisfied prior to the appeal. The principles of *Cone* and *Globe* are thus not applicable.

2. Utah Pie filed no motion for a new trial either on the conspiracy count or as to the inadequacy of the damages under the alleged Section 2(a) violation, though it maintains here that the evidence against Pet would have supported a verdict for $261,046 "actual damages." (Brief 57)

3. Knowing that the Pet Milk Company was questioning the sufficiency of the evidence against it on appeal, Utah Pie nevertheless made no effort under Rule 50(d) as appellee to "assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict." (Rule 50(d))

4. The court of appeals "excluded" no evidence directed by Utah Pie against Pet but found such evi-

dence insufficient as a matter of law to support the verdict.

5. Utah Pie today stands in this Court alleging that it *"does not claim that any evidence which should have been admitted has been erroneously excluded from the evidence in the trial court."* (Emphasis supplied, Brief 136) Thus, Utah Pie is satisfied with the evidence it adduced at the trial. It took no exceptions to the trial court's instructions; it does not intimate that any other evidence is available to it; and it has suggested at no place an alternative theory of liability against the Pet Milk Company. The *Weade* doctrine therefore does not call for a modification of the court of appeals' order to the trial court.

More than three and one-half years have elapsed since the conclusion of the proceedings in the trial court. The trial judge has undoubtedly heard numerous trials since that time. The record is no longer fresh in his mind. The "last chance" of correcting errors has long since passed. The parties have encountered the "delay, expense or other hardships of an appeal." Still stoutly insisting as to the sufficiency of its evidence, Utah Pie stands on the record it made below, and there is no "hole" in the evidence created by the court of appeals as to Pet. The *Cone* and *Globe* cases thus do not require that Utah Pie be given a belated right to file motion for new trial in the trial court. On the state of this record it would be a needless gesture.

CONCLUSION

Utah Pie Company's evidence was insufficient to permit submission to the jury of its claim that Pet Milk Company had violated Section 2(a) of the Clayton Act, to the injury of Utah Pie. The Court of Appeals was correct in finding that the evidence, viewed in the light most favorable to Utah Pie, was wholly insufficient to support the finding of such violation.

Appellate courts have long had authority, at common law and under statute, to direct a trial court to enter judgment notwithstanding a jury verdict, on the ground that the evidence introduced in the trial court does not support the verdict. Rules 50(c) or 50(d) did not affect that authority, either to enlarge or diminish it. The Court of Appeals for the Tenth Circuit had authority to direct the District Court to enter judgment for Pet Milk Company, notwithstanding the jury's verdict; and under the facts of this case was correct in so directing the District Court.

The decision of the Court of Appeals, and its direction to the District Court to enter judgment in favor of Pet Milk Company should be affirmed.

In the alternative, the Pet Milk Company is entitled to have the proceeding remanded to the Court of Ap-

peals for consideration of the other grounds urged by Pet for reversal but which the Court of Appeals did not consider. (R. 1453)

Respectfully submitted,

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